Starbucks Corporation d/b/a Starbucks Coffee Company *and* Local 660, Industrial Workers of the World. Cases 2–CA–37548, 2–CA–37599, 2–CA–37606, 2–CA–37688, 2–CA–37689, 2–CA–37798, 2–CA–37821, and 2–CA–38187

October 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 19, 2008, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.[1]

The National Labor Relations Board[2] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent unlawfully implemented and enforced a rule prohibiting employees from wearing more than one prounion button. On at least two occasions, the Respondent enforced its rule to require employees wearing two prounion buttons to remove one before working. The judge found that while the Respondent expected its employees to present a certain image to the public, the Company not only countenanced but encouraged employees to wear multiple buttons as part of that image. The record established that employees, in fact, regularly wore numerous buttons and pins on their hats and aprons, and the judge found, and we agree, that those pins would not be immediately recognizable by customers as company-sponsored. Rather, as the judge found, the image conveyed to the consumer was merely that of employees wearing a variety of pins and buttons. The union buttons at issue (approximately 1-inch in diameter and bearing the acronym "IWW") were no more conspicuous than the panoply of other buttons employees displayed. Consequently, on the facts of this case, we agree with the judge that the Respondent did not establish special circumstances justifying its one-button rule. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). Thus, we find that the discriminatory prohibition unlawfully interfered with employees' Section 7 rights.[4]

We further adopt the judge's findings, for the reasons she stated, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging baristas Joseph J. Agins Jr. and Daniel Gross,[5] and by issuing disciplinary

[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __U.S.L.W.__ (U.S. September 29, 2009) (No. 09-377).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions we adopt pro forma the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by prohibiting employees from discussing the Union while off duty; discriminatorily prohibiting employees at the Respondent's Union Square East store from using a company bulletin board to post items of a nonwork nature including materials relating to the Union, and from entering the back of the store; promulgating and maintaining a rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions; and promulgating and maintaining a rule prohibiting employees from talking about terms and conditions of employment. Also in the absence of exceptions we adopt the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) of the Act by disciplining employee Tomer Malchi pursuant to its unlawful rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions; discriminatorily preventing Malchi from working shifts at other Starbucks locations; and issuing a written warning to employee Daniel Gross on August 5, 2006. Finally, in the absence of exceptions we adopt the judge's dismissal of allegations that the Respondent disparately enforced its dress code against employees Sulay Ayala and Tomer Malchi and unlawfully interrogated employee Isis Saenz.

[4] See *Holladay Park Hospital*, 262 NLRB 278, 279 (1982) (by prohibiting only the wearing of a particular union insignia (yellow ribbons) while permitting other prounion and nonunion-related buttons, respondent enforced dress code in a discriminatory manner, violating Sec. 8(a)(1)).

[5] In finding the Respondent's discharge of Agins violated the Act, Member Schaumber adopts the judge's analysis under *Atlantic Steel*, 245 NLRB 814 (1979), and therefore does not reach her analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Additionally, although he finds that the Respondent unlawfully discharged Gross under the facts here, Member Schaumber notes that the Act does not give employees

performance evaluations to Gross on January 29, April 14 and 29, and August 5, 2006.

As explained below, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging barista Isis Saenz for participating with a group of people who followed Regional Vice President James McDermet for almost 2 city blocks after an October 26, 2006[6] union rally, shouting threats, taunts, and profane comments at him.

Facts

Isis Saenz was a barista at the Respondent's East 57th Street store and an open union supporter. On the evening of October 26, Saenz, along with two other current employees of the Respondent, participated in a boisterous rally of at least 15 union members and supporters that occurred both inside and outside of a Starbucks' store at 29th Street and Park Avenue, where the Respondent was holding a book promotion at which the Respondent's CEO and other executives were scheduled to appear. Saenz and Charles Fostrum, a former employee, videotaped the event. On Fostrum's videotape, Saenz can be heard yelling, "Hey Barbie Doll baristas" at employees who were exiting the store. Regional Vice President McDermet prepared to leave the store at about 8:30 p.m. Former employee Daniel Gross instructed the demonstrators not to touch him. Saenz echoed that but added, "Spit on him."[7]

As McDermet exited, the demonstrators began shouting, taunting him, and chanting, "Shame, shame, shame." Saenz and approximately five others then broke away from the rally and began to follow and shout at McDermet as he turned the nearby corner and walked toward his home.[8] Saenz and Fostrum continued to videotape McDermet. As the group pursued McDermet, one or more shouted remarks such as "We know where you live," "Fuck Starbucks," "Stand up for yourself," and "We are following you now, boy." Saenz did not make any of these comments, but shouted "Jimmy, Jimmy, why won't you speak to us?; Why are you ignoring your workers?;" and "Jimmy, spend some time with us, Jimmy." Saenz admitted at the hearing that she was also chanting and laughing at McDermet.[9] When McDermet was about halfway down the block, two people joined him (one a marketing manager for the Respondent) and walked with him a short distance. Saenz and Fostrum turned back shortly thereafter, having followed McDermet for close to 2 blocks. As she left, Saenz called, "See you next time, Jim." The few remaining demonstrators continued to follow McDermet, but the shouting apparently abated after Saenz left.

McDermet testified that he felt threatened and intimidated and took a circuitous route away from his apartment in an effort to get away from the people following him. He testified that he filed a police report because this was not the first time that he felt threatened or had been threatened in connection with the organizing activity, and he wanted to establish a police record in the event this harassment continued.

District Manager Veronica Park subsequently met with Saenz and Partner Resources Manager Joyce Varino. Saenz confirmed that she had attended the October 26 rally. She admitted calling McDermet "Jimmy, Jimmy," but told Park that she did not mean to be disrespectful, and that she was just trying to get his attention. Saenz conceded to Park that McDermet may have felt threatened or intimidated, and that she "may" have heard someone say, "We know where you live" to McDermet, but that she did not know who. Park testified that she discharged Saenz for her conduct in following McDermet "due to the fact that she was not following our guiding principle of treating people with respect and dignity." Park testified without contradiction about other incidents in which she terminated employees for being insubordinate and disrespectful to other partners and supervisors.

Discussion

Because the Respondent discharged Saenz for her conduct following the October 26 rally, the appropriate analysis is whether the Act initially protected her conduct and, if so, whether she lost that protection at any point. See *Tampa Tribune*, 351 NLRB 1324, 1325 (2007), enf. denied on other grounds 560 F.3d 181 (4th Cir. 2009). Although "employees are permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co*., 313 NLRB 1289, 1290 (1994). The Board applies a four-factor analysis in determining whether conduct occurring in connection with otherwise protected activity, such as the rally, is of a nature sufficient to remove it from the

license to tell their coworkers not to do their jobs. Chairman Liebman finds it unnecessary to pass on whether the *Atlantic Steel* analysis or the *Wright Line* analysis is the more appropriate test to apply given that Agins' discharge would be unlawful under either approach.

[6] Dates are in 2006, unless otherwise noted.

[7] A voice, which the judge could not determine belonged to Saenz, also shouted, "Piss on him." McDermet was still inside the store and did not hear these remarks, however, and there is no evidence that the Respondent knew of the comments when it discharged Saenz.

[8] Of this group, only Saenz was a current employee.

[9] McDermet testified that some of those following him were carrying sticks. Saenz testified that some had signs but did not think that she was carrying hers when she followed McDermet.

Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).

Applying these factors, we find, contrary to the judge, that while Saenz' initial participation in the rally was protected concerted activity, she lost the protection of the Act when she left the rally and actively participated in a group that shouted profanity at, taunted, and followed McDermet at night for almost 2 blocks away from the Starbucks facility.

The judge found that the place factor in the *Atlantic Steel* analysis weighed in favor of protection because the conduct occurred on a public sidewalk, Saenz and the current employees engaged in the rally were off duty, and there was no evidence that on-duty employees heard her remarks. We disagree with the judge's analysis. Her focus on the off-duty status of the employees who witnessed the misconduct is inconsistent with our precedent. The location of an employee's conduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty.[10] The question is whether there is a likelihood that other employees were exposed to the misconduct. *Postal Service*, 350 NLRB 441, 459 (2007). Here, the answer is clearly yes. There were at least 15 demonstrators involved in the rally, including at least 2 then-current employees under McDermet's authority. Moreover, as McDermet exited the store and walked through the crowd that was taunting and shouting at him, Saenz and at least five of her companions began to pursue him in view of those present, including the two current employees who participated in the rally. This group continued to shout threatening remarks at McDermet as they followed him, and Saenz continued to taunt McDermet for approximately 2 blocks. In light of the public nature of this misconduct, which commenced in plain view of employees under McDermet's authority, we find that the place factor weighs against Saenz retaining the Act's protection.

We agree with the judge, and the Respondent does not contend otherwise, that the second *Atlantic Steel* factor, the subject matter under discussion, weighs in favor of protection.

Contrary to the judge, we find that the third factor, the nature of Saenz' conduct, weighs against protection. At the outset, we disagree with the judge's finding that McDermet overstated the threatening nature of the incident. We find that a person in McDermet's situation would have reasonably been intimidated. He was being followed at night by a group that was shouting at and taunting him, as well as making intimidating statements such as "We are following you now boy," and "We know where you live." We further observe that the situation appeared sufficiently threatening that two individuals joined McDermet in an effort to provide an escort, and that McDermet changed his route out of fear to escape the people following him and subsequently filed a police report.

As to Saenz' actions, she was part of a group that targeted McDermet and deliberately sought to intimidate him.[11] She followed McDermet for approximately 2 blocks away from the store, making comments such as "Jimmy, Jimmy, why won't you speak to us?" as others directed profane and threatening remarks at him. Some of these remarks personally targeted McDermet rather than Starbucks in general and put him in reasonable fear of continued intimidating behavior at his home. As she admitted, Saenz knew that McDermet may have felt threatened. Despite this, she persisted in following him and making remarks that were clearly intended to intimidate. Her later explanation to Park that she was only trying to get McDermet's attention is not persuasive given that, moments before following him, Saenz had shouted at demonstrators to "spit on him"—surely an attempt to incite others to misconduct. We find that the third *Atlantic Steel* factor weighs against Saenz retaining the Act's protection.

As to the fourth *Atlantic Steel* factor, we find, as did the judge, that it weighs against protection. There is no evidence that the Respondent provoked Saenz' misconduct. Although we have found several unfair labor practices in this case, none were directed at Saenz, and the most recent unfair labor practice prior to this incident occurred 2 months earlier and at a store other than the one where Saenz worked. Nor was Saenz spontaneously

[10] See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (finding employee's sustained profanity in break room in presence of coworkers would tend to undermine authority of supervisors subject to his verbal attack); cf. *Tampa Tribune*, supra at 1326 (employee outburst away from other rank-and-file employees did not undermine supervisor's authority).

[11] The Board has recognized that employers may lawfully discipline employees who engage in misconduct in concert with others. See *Auburn Foundry, Inc*., 274 NLRB 1317, 1317–1318 (1985) (respondent lawfully terminated striking employee who, although merely a passenger in vehicle, was "in association" with others who engaged in high speed chase to intimidate nonstriking employees), enfd. 791 F.2d 619 (7th Cir. 1986); see also *Restaurant Horikawa*, 260 NLRB 197, 197–198 (1982) (employee who participated in demonstration by entering respondent's restaurant and thus disrupting business forfeited the Act's protection).

reacting to a stressful situation such as a grievance meeting, disciplinary action, or tense workplace situation.

In sum, we find that only one factor, related to the subject matter of the discussion, favors continued protection, while the other factors weigh against it. Saenz thus engaged in conduct that lost the Act's protection. In so finding, we emphasize that the element of deliberate intimidation distinguishes her behavior from the type of spontaneous, provoked, and nonthreatening outbursts that the Board has found protected in other cases.[12] Accordingly, we reverse the judge and dismiss this allegation.[13]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Starbucks Corporation d/b/a Starbucks Coffee Company, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

"(d) Implementing and enforcing a rule that unlawfully discriminates against the wearing of prounion buttons."

2. Substitute the following for paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Within 14 days from the date of the Board's Order, offer Joseph Agins Jr. and Daniel Gross full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(d) Respondent shall also make Agins and Gross whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing the Union while off duty.

WE WILL NOT discriminatorily prohibit employees at our Union Square East store from using a company bulletin board to post material of a nonwork nature, including materials relating to the Union.

WE WILL NOT discriminatorily prohibit our off-duty employees at our Union Square East store from entering the back of the store.

WE WILL NOT implement and enforce a rule that unlawfully discriminates against the wearing of prounion buttons.

WE WILL NOT prohibit you from discussing the Union while allowing other nonwork-related discussions.

WE WILL NOT prohibit you from talking about terms and conditions of employment with your coworkers.

[12] See, e.g., *Stanford Hotel*, 344 NLRB 558 (2005) (spontaneous, provoked outburst of profanity protected); *Alcoa, Inc*., 352 NLRB 1222, 1226 (2008) (spontaneous profanity in grievance meeting protected as it was not the product of a conscious decision to degrade supervisor).

[13] The judge found, and we agree, that Saenz' conduct is appropriately analyzed under *Atlantic Steel*, supra. We disagree with her further conclusion that the Respondent's discharge of Saenz would be unlawful under a *Wright Line,* supra, analysis as well. Analysis under *Wright Line* is inapplicable because it is undisputed that the Respondent discharged Saenz for her conduct after the demonstration, and the only issue is whether that conduct was protected. See *Aluminum Co. of America*, supra at 22. Assuming arguendo that a *Wright Line* analysis were appropriate, we would still dismiss the allegation because we find that the Respondent met its rebuttal burden by showing that it would have discharged Saenz regardless of her protected activities. The judge relied on cases in which the Board found protected employee impertinence toward managers that involved brief, spontaneous reactions to workplace stress, such as cursing and refusing to follow directions. As noted above, such conduct is distinguishable from the incident here. Further, the Respondent showed that it had discharged employees for disrespectful and insubordinate conduct toward managers in the past.

WE WILL NOT discipline you for talking about the Union while allowing other nonwork-related discussions.

WE WILL NOT discriminatorily prevent you from working shifts at other Starbucks locations.

WE WILL NOT issue written warnings or negative employment evaluations to you because you support the Union or because of your other concerted, protected activities.

WE WILL NOT discharge you because of your support for the Union or your other concerted, protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any discipline issued to Tomer Malchi pursuant to a discriminatory rule prohibiting employees from talking about the Union, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files employment evaluations to Daniel Gross January 29, April 14 and 29, and August 5, 2006, and a corrective action issued to him on August 5, 2006, and WE WILL, within 3 days thereafter notify Gross in writing that this has been done and that the employment evaluations and discipline will not be used against him in any way.

WE WILL make Gross whole for any loss of earnings and other benefits suffered as a result of the aforementioned performance evaluations.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Agins Jr. and Daniel Gross full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Agins Jr. and Daniel Gross whole for any loss of earnings and other benefits suffered as a result of their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Joseph Agins Jr. and Daniel Gross, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

STARBUCKS CORPORATION D/B/A STARBUCKS COFFEE COMPANY

Burt Pearlstone and *Audrey Eveillard, Esqs.,* for the General Counsel.

Daniel Nash, Stacey Eisenstein, and *Nicole Morgan, Esqs. (Akin Gump Strauss Hauer & Feld, LLP),* of Washington, D.C., for the Respondent.

Stuart Lichten, Esq. (Schwartz, Lichten and Bright), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Commencing on March 14, 2006, Local 660, Industrial Workers of the World (the IWW or the Union) filed charges and amended charges against Starbucks Coffee Corporation d/b/a Starbucks Coffee Company (Starbucks or Respondent) alleging, among other things, that Respondent interrogated employees, implemented new policies, more strictly enforced old policies, and disciplined and discharged employees in retaliation for employees' support of the Union and other concerted, protected conduct. On June 12, 2007, the Regional Director for Region 2, issued an order further consolidating cases, consolidated complaint and notice of hearing. The Respondent filed an answer denying the material allegations of the complaint, and raising certain affirmative defenses. This case was tried before me in New York, New York, over the course of 20 days between July 9 and October 25, 2007. During the course of the hearing, counsel for the General Counsel made various amendments to the complaint,[1] and Respondent filed an amended answer, again, denying the material allegations of the complaint, as amended, and reiterating its general affirmative defenses.[2]

[1] Specifically, at various times throughout the hearing Counsel for the General Counsel moved to amend pars. 5(a), 8, 10, 12(b) and (c), 14(e), 15(b), 17(a), 20, 21, 22, and 23(a), and such motions were granted. In addition, I reserved ruling on the General Counsel's motions to amend pars.11 and 18(b), as discussed below.

[2] At the inception of the hearing, counsel for the General Counsel requested that Respondent specify which allegations of the complaint were being challenged by Respondent's affirmative defenses, and reiterated this request at the close of its case-in-chief. Respondent declined on both occasions, and does not raise any such claims in its posthearing brief. It is well settled that the party raising an affirmative defense bears the burden of proof. As Respondent has failed to specify those allegations of the complaint which it is contesting on this basis or to cite any evidence to support the general assertions contained in its answer, I conclude that it has failed to meet its burden of proof in this regard. In its answer to the complaint, Respondent has further asserted that certain complaint allegations were not encompassed by the charges filed by the Union. A charge is not a pleading and does not require the specificity of a pleading. It merely serves to initiate a Board investigation to determine whether a complaint should be issued. *NLRB v. Fant Milling Co*., 360 U.S. 301, 307 (1959). A charge "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the subject matter." *NLRB v. Louisiana Mfg. Co*., 374 F.2d 696, 704, 705 (8th Cir. 1967). Here, I find that the charges and amended charges filed by the IWW are sufficient in this regard.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel[4] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a domestic corporation with places of business located 200 Madison Avenue (36th Street), 145 Second Avenue (9th Street), 15 Union Square East (Union Square East), and 116 East 57th Street (57th Street), New York, New York, where it is engaged in the operation of retail coffee shops. Annually, in the course and conduct of its business operations, Respondent derives gross revenues in excess of $500,000 and purchases and receives goods and supplies valued in excess of $5000 at each of the facilities described above, directly from suppliers located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). Respondent further admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Starbucks Corporate Structure and Retail Stores

Starbucks Coffee Company (Starbucks or Respondent) operates retail coffee stores throughout the United States. Starbucks has numerous stores throughout New York City including the four locations noted above which are primarily involved herein. These stores are part of the New York Metro region, which in turn is comprised of a number of "districts" which each contain, on average, eight to nine stores. Each district is managed by a district manager (DM) who reports to a regional director (RD) who is responsible for several districts. The regional directors report to the regional vice president. James McDermet was the regional vice president of the New York Metro region from April 2005 until September 2007, at which time six regional directors reported directly to him.

Traci Wilk has been the director of partner resources for the New York Metro region since January 2007. Previously, she served as partner resource manager for 4 years. Her area of responsibility included the downtown Manhattan stores at all relevant periods of time.[5] The partner resources department coordinates employment and policy issues relating to the stores and its employees. According to Wilk, the partner resources department is not the primary decision maker in regards to termination decisions or policy implementation but, rather, may be consulted and will provide a recommendation when a store manager has questions about the implementation of a store policy or the imposition of employee discipline. In general, such decisions are the primary responsibility of the store manager. The role that the partner resources department in general, and Wilk in particular, has played in the determination of the discipline at issue herein, is discussed below.

Starbucks stores are staffed by employees known as "partners," consisting primarily of hourly employees known as "baristas" and shift supervisors. Generally, the duties of these two classifications of employees include preparing beverages, processing customer payments, cleaning and stocking the store, and product merchandizing. Each store has a store manager (SM) and, in many cases, one or more assistant store managers (ASMs).

B. The Industrial Workers of the World and its Attempt to Organize Employees

In 2004, the IWW launched a campaign to organize the employees of Starbucks. On May 17, 2004, former Starbucks barista Daniel Gross filed a representation petition with the Board on behalf of the IWW[6] seeking to represent employees located at the 36th Street store. The IWW withdrew its petition on July 29, 2004. Since that time, there have been no further attempts to invoke the Board's processes in a representational capacity.[7] The Union has, however, conducted various protests and other public demonstrations during the past several years. These actions included leafleting at various Starbucks stores, telephone calls made to various members of Starbucks management, public statements to the media, the launch of a union Website, and as discussed below, several large demonstrations outside various Starbucks facilities. According to the testimony of several Starbucks managers, such demonstrations were at times disruptive of store operations, and intimidating to store personnel and customers.[8]

C. Starbucks Coordinates its Response to the IWW

The record reflects that Starbucks developed both a local and national response to the IWW's attempts to organize employees. Locally, Wilk, in conjunction with the New York Metro partner resource team, was centrally responsible for collecting and disseminating information regarding the union activities of employees and the level of union support in the stores. Among other things, managers of stores where union activity was suspected conducted standardized interviews of employees in an attempt to gauge employee satisfaction with their employment circumstances and to identify possible or likely union supporters. Employees who expressed a desire not to affiliate with the IWW were termed "pro-Starbucks" and lists of known union

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or because it was inherently incredible or unworthy of belief.

[4] In its posthearing brief, counsel for the General Counsel moved to withdraw pars. 8, 13, and 20 of the complaint. This motion is granted.

[5] Wilk was on leave during the period from February to July 2004.

[6] The Union also refers to itself as the "Starbucks Workers Union."

[7] It is not contended that the IWW represents a majority of employees in any appropriate unit.

[8] According to Respondent, IWW supporters at times engaged in conduct such as spitting at managers, name calling, various acts of vandalism, and blocking access to the stores. In addition, the leaflets distributed by the IWW frequently contained the phone numbers of managerial personnel. According to several Respondent witnesses, they received phone calls from unidentified apparent IWW supporters, which were, at times, threatening in nature.

supporters as well as "pro-Starbucks" partners were maintained. If a store where union activity was suspected needed personnel, Respondent would transfer known "pro-Starbucks" partners, rather than hire new employees.

Wilk both received and disseminated weekly summaries of the activities of union supporters and created spreadsheets to track union support. Wilk further issued memoranda to store managers requesting to review the performance evaluations of and to be informed prior to the discipline of any known or suspected union supporter.[9] Respondent disseminated what information it received regarding off-duty employee gatherings, such as parties, where recruiting was suspected. Respondent also established standards and procedures for the discipline and separation from employment for union supporters. Wilk conducted seminars with managers in which they discussed what can and cannot be done in stores where employees are asking questions about unionizing. She, along with others, prepared written guidance regarding the Company's position on unions to provide managers with resources to turn to in the event questions arose. Managers were instructed not to take retaliatory actions against employees who expressed their support for the Union.

As Wilk testified, these efforts also stemmed from the various unfair labor practice charges filed by the IWW. As such charges began to be filed, commencing shortly after the organizing campaign began during the summer of 2004, Wilk became involved with store managers "both proactively and reactively" to assist them with employment issues that arose as a consequence of the IWW's activities. Thus, her instructions to review performance reviews or termination decisions prior to implementation stemmed from an asserted effort to ensure that these were administered in the manner as they would be if challenged by any employee, whether a union supporter or not.[10]

Wilk and McDermet also issued memoranda to managerial personnel relaying information that was posted on the Union's Website. This information was received on a regular basis from the Starbucks media department, which informed upper-level management of any print, internet or television segments related to Starbucks and its stores, whether union related or not. In addition, Starbucks also employed the services of a media consultant to review and respond to any negative publicity caused by the Union's public demonstrations and various press releases. When union-sponsored protests or rallies took place, Respondent increased management presence in the targeted stores, to ensure that on-duty employees had the support they required.

According to Respondent, the steps taken with respect to the IWW mirrored those taken in response to protests conducted by nonunion groups and were part of an overall effort to ensure employee safety and minimize disruption to business. In particular, Respondent cites to protests by two groups unrelated to the IWW. One involved "Reverend Billy," an individual who has presented himself at various Starbucks stores, performing "musical acts" to lodge protests against the Company. When Respondent became aware of a planned "Reverend Billy" protest in February 2006, various managerial personnel were present at the store to lend support to the store employees. Respondent's partner and asset protection (P&AP) department was notified, and police were notified as well. A memorandum was circulated outlining the preparation that was undertaken and the Company's potential responses to the protest. On another occasion, there was a planned protest by the Organic Consumers Association (OCA) and Regional Director (RD) Wendy Beckman and other managers were present in the stores to lend support to partners.

D. The Alleged Discriminatees

The allegations of the instant case involve, among other things, disciplinary warnings issued to Suley Ayala, Tomer Malchi, and Daniel Gross as well as the discharges of Gross, Joseph Agins Jr., and Isis Saenz. The following will briefly place their tenure of employment in context and explain the general nature of the discipline imposed. More detailed discussion of these matters will follow below.

1. Joseph Agins Jr.

Agins, who worked at the 9th Street store as a barista, was hired in or about May 2004 and discharged on December 12, 2005. Agins first learned about the Union some time in 2004, and asked his then-store manager about it. He was cautioned not to speak about the Union. In April 2005, Agins was identified as a likely union supporter by his district manager (DM), William Smith. On April 25, Smith wrote to Wilk that his identification of Agins as a supporter was "based upon attitude, attending last party, friend of Alex[11] and requested off for the new party."

Subsequently, on May 28, 2005, a petition in support of the Union containing the names of several employees was presented to ASM Tanya James. Agins' name was among those listed. After this time, Agins was an active participant in many union rallies and protests. Respondent has argued that Agins' discharge was prompted by an inability to maintain his composure while working and, in this regard, has pointed to certain instances where it is alleged that Agins behaved in an insubordinate manner during which he used profanity.

2. Suley Ayala

Ayala began working for Starbucks at the Union Square East location in July 2002. She joined the IWW in about November 2005, and was part of a public announcement of employee support for the Union. She thereafter openly participated in a number of union-sponsored rallies and protests. At issue herein are

[9] For example, in a December 1, 2004 memorandum, Wilk stated that: "Going forward any corrective action that is issued to any suspected salts will pass through me as we need to ensure that we are being consistent and fair in our treatment of performance opportunities."

[10] Wilk initially testified that she did not review all termination decisions prior to implementation, as there were too many. In its brief, however, Respondent appears to take the contrary position: that Wilk's review of partner personnel files "was consistent with her practice of reviewing the performance of any partner before recommending any termination."

[11] Alex Diaz, an employee at the 9th Street store, had been identified as a union supporter.

certain warnings and other disciplinary actions taken toward Ayala for what Respondent has claimed is her failure to follow its dress code and the instructions of her superiors with regard thereto. Ayala resigned from her employment with Starbucks in May 2007.

3. Daniel Gross

As noted above, Gross filed the initial representation petition seeking to represent employees at the 36th Street store, where he worked as a barista from May 2003 until his discharge on August 5, 2006. Gross' extensive history of union activities is not disputed. Respondent asserts that he was discharged due to a history of poor work performance. Also at issue herein are several performance evaluations as well as a disciplinary warning issued to Gross, for claimed harassment of a Starbucks manager. The General Counsel has additionally alleged, in connection with this incident, that Gross was unlawfully interrogated and threatened with discharge.

4. Tomer Malchi

Malchi worked at the Union Square East store from April 2005 until his resignation in July 2007. He joined the Union in about May 2005, although his union activities were minimal and apparently not known to management at the time. Later that year, he began openly discussing the Union with coworkers and took part in the official announcement of union support at that store on November 18. The General Counsel has alleged that Respondent engaged in a series of discriminatory actions against Malchi including selectively enforcing its dress code and solicitation policies and by issuing a series of written warnings and prohibiting Malchi from working at other Starbucks locations.

5. Isis Saenz

Saenz worked as a barista at the 57th Street store for somewhat over 1 year. She became a member of the IWW in about March 2006, and thereafter openly participated in various union activities. She was discharged on October 26, 2006. Respondent contends that Saenz was discharged due to disrespectful, threatening, and profane conduct exhibited toward Regional Vice President James McDermet during the course of a union-sponsored rally.

E. Presettlement Background Evidence Cited by the General Counsel

As will be discussed below, in March 2006, Respondent entered into a settlement agreement with the General Counsel which resolved various outstanding unfair labor practice charges filed by the IWW. The General Counsel relies on certain presettlement incidents as background evidence as follows.

1. The union announcement at the 9th[h] Street store

On May 28, 2005, employees at the 9th Street store formally announced their union membership. Barista Peter Montalbano, together with two coworkers, Laura DeAnda and Carolyn Livensperger, approached ASM Tanya James with a letter signed by other employees, including Agins, who had authorized their names to appear on the document. Montalbano presented the letter to James and asked her to forward it to upper management. Montalbano then clocked in, put on union pins, and began to work. Approximately 20 minutes later a small group of IWW supporters, including Sarah Bender, an employee and union supporter who had previously been discharged, gathered outside the store and began handing out fliers to customers and passersby.[12] Montalbano approached James in the back room and told her that employees were trying to improve working conditions. James stated that she understood and that it was fine with her if they joined the Union so long as they did not harass partners or engage in solicitation on the floor.

Some time later that day SM Julian Warner and DM William Smith arrived at the store. Smith directed Montalbano, DeAnda, and Livensperger to remove their union pins. After being questioned by Montalbano, Smith stated that he was requiring them to remove the pins because they were not Starbucks-issued. After Montalbano unsuccessfully tried to get Smith to change his mind, the employees complied with Smith's directive. Agins, who was on vacation at the time, subsequently approached SM Warner to announce that he was a member and supporter of the IWW.

2. The June 2005 demonstrations

In June 2005, the IWW organized two demonstrations in front of a store located at 1st Avenue and 17th Street (the 17th Street store), in protest of Bender's termination. The first took place on June 4 and lasted for approximately 2 hours. Employees participating in this event included Gross, Malchi, Montalbano, and DeAnda (as well as Bender). Also present were members of other community organizations and a NBC television crew. All told, there were approximately 20 to 30 demonstrators present, wearing union insignia, chanting, handing out leaflets, and holding signs. DM Smith, along with other managerial personnel, was present and witnessed this event.

At some time after June 4, Montalbano, along with three other employees including Agins, returned to the 17th Street store to distribute fliers to passersby announcing another demonstration, scheduled for June 18. The police arrived and informed the leafleters that the sidewalk was private property and they had to disband. The employees went to the rental office of the apartment complex where the Starbucks facility was located and were told that the sidewalk was public property. They then returned to 17th Street store and resumed their distribution of fliers. Although the police were again summoned, the officers permitted the leaflet distribution to continue.

On June 18, a second demonstration was held at the 17th Street store. It lasted for about 3 hours and there were approximately 20 to 30 demonstrators present including Gross, Malchi, Montalbano, DeAnda, and Bender. Again, the demonstrators wore union insignia, chanted, held picket signs, and distributed leaflets. At about 3 p.m., they proceeded to the 9th Street store where they encountered DM Smith and SM Warner accompanied by several police officers. Initially, the group was told they could not picket or leaflet, but the police apparently changed their position, because the demonstration proceeded. Agins, who was working that afternoon, joined the group once his shift was completed. Montalbano left the group at about 5:30 p.m. as

[12] Among other things, the fliers were in protest of Bender's discharge. Bender was subsequently reinstated as a result of the March 2006 settlement.

he was scheduled to work that day. Customers asked about what was going on outside the store. Montalbano explained to the customers that he was a member of the IWW and that a union demonstration was taking place outside the store. According to Montalbano, Smith stated: "Now Peter, you know better than that, you're on our time now." Subsequently, when customers asked Montalbano about what was occurring outside the store, he advised them that he was unable to speak with them about it and if they wanted information they could speak to the leafleters outside for information. According to Montalbano, Smith ordered him to clock out for his refusal to cease speaking about the Union.

3. The announcement at the Union Square East store

By November 2005, Malchi had successfully approached about half his coworkers at the Union Square East store, including Ayala, about joining the Union. They decided to make their union affiliation known to management. On November 18, a number of employees including Malchi, Ayala, Gross, and Montalbano met at a nearby location, put on union buttons and headed to the store to present a letter to management. Certain members of the group went inside, others remained outside to hand out fliers. SM Michael Quintero met with the group and Malchi handed him a letter containing a "list of demands." Malchi asked Quintero to forward the letter to upper management and further requested a meeting to discuss matters such as work hours and individual grievances. Quintero asked if anyone else had something to say, and various individuals spoke. Malchi told Quintero not to take this personally, that employees really liked him and the employees' problems stemmed from company policies. Quintero told the employees to return to work. Malchi pressed for a meeting, and Quintero stated that he would get back to him. The following Monday, Quintero informed Malchi that upper management would not meet with a group of employees to discuss the issues raised by the letter.

4. Respondent requires employees to remove union buttons

In late November 2005, Montalbano received a call for advice from DeAnda who had worn a union pin to work that morning and had been told that if she did not remove it, she would be sent home. Montalbano later learned that DeAnda had been sent home and Montalbano told DeAnda that he would wear a union pin during his shift later that day to support her.

Montalbano wore a union pin as he commenced working his shift later that day. He was summoned to the back room of the facility by SM Warner and was ordered to remove the pin. Montalbano stated that it was unlawful to require him to remove the pin and Warner replied that a refusal to remove the pin would be insubordination. Montalbano was offered the option of removing the pin or clocking out. He chose the latter option.

5. The "Black Friday" demonstration

In the retail industry, the day after Thanksgiving is often referred to as "Black Friday," as it is one of the busiest shopping days of the year. In 2005, Black Friday occurred on November 25. The Union had organized a demonstration in front of the Union Square East store in protest of management's refusal to meet with employees at that store and to publicize the various unfair labor practice charges filed by the Union which, at the time, were under investigation. The demonstration began at about 7 a.m. and there were several individuals present throughout the day, handing out fliers. By about 6 p.m. the number of demonstrators had swelled to at least 30 people. These included Malchi, DeAnda, Gross, Montalbano, Bender, Agins, and Ayala. The demonstrators chanted and held picket signs. According to the testimony of various Respondent witnesses, at times the protestors crowded by the door, blocking access, or impeding customers from leaving the store. On this occasion, the union supporters also held a press conference, and a number of employees including Gross, Malchi, and Ayala spoke on behalf of the demonstrators.

At some point during the afternoon, Malchi looked through the store's plate glass window and observed RD Wendy Beckman sitting at a table with McDermet, DM Kim Vetrano, and SM Quintero. Robert Ayala, who is married to Suley, was sitting at an adjacent table, waiting for his wife to complete her shift. As Robert Ayala testified, he overheard these managers discussing the protest. At the time, Robert Ayala had met Quintero and recognized one of the other female individuals as someone he had seen at Starbucks' corporate offices. He overheard one of the individuals at the table, who was later identified to him as RD Wendy Beckman, state, "We should fire them all." According to Robert Ayala, Quintero told this individual that they could not do that. When Ayala got off work, Robert reported to her what he had overheard, and Ayala named and identified the individuals as members of Starbucks management.

Beckman denied making this comment, stating that she would never do such a thing or behave in such a fashion. Neither McDermet, Vetrano, nor Quintero, who all testified herein, was asked about this matter.

6. The March 2006 settlement agreement

On March 7, 2006, Starbucks entered into an informal settlement agreement with the Board, settling various unfair labor practice charges previously filed by the Union. Shortly thereafter, the Union commenced filing a series of new unfair labor practice charges, some of which are the subject of the instant complaint.[13] Among the allegations initially settled, several are relevant to the instant matter. In particular, Respondent agreed to revise its solicitation policy and its policy prohibiting the

[13] Although a number of the allegations of the instant complaint predate the settlement agreement, it was specifically provided therein that: "[i]t does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to [the] evidence."

wearing of buttons or pins. The revised policies[14] provide as follows:

> *Distribution Notices/Soliciting*
>
> Partners are prohibited from distributing or posting in any work areas any printed materials such as notices, posters or leaflets. Partners are further prohibited from soliciting other partners or nonpartners in stores or Company premises during working time or the working time of the partner being solicited.
>
> *Pins*
>
> Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue. The only buttons or pins that will be permitted are those issued to the partner by Starbucks for special recognition or advertising a Starbucks-sponsored event or promotion; and reasonably-sized and—placed buttons or pins that identify a particular labor organization or a partner's support for that organization, except if they interfere with safety or threaten to harm customer relations or otherwise unreasonably interfere with Starbucks public image.

F. Postsettlement Union Activity

1. Employees announce their union affiliation at the 57th Street store

In June 2006, Charles Fostrum and Isis Saenz, who were the primary union supporters at the 57th Street store, decided to make their support known to SM Patrice Britton. They drafted a letter setting forth their concerns regarding working conditions at the store. The following day, June 16, Saenz approached two coworkers, told them of the planned announcement, obtained their signatures on the letter and gave them union buttons to wear at the time of the declaration.

At approximately 2:30 p.m. a group of about five IWW members and supporters, including Malchi, entered the store wearing union insignia. They situated themselves in an open space near the seating area, and some purchased Starbucks products. As they entered, Saenz put an IWW pin on her hat. Saenz and Fostrum then approached Britton with the letter, signed by four employees. Britton refused to accept it.[15] Fostrum then made a general announcement to the effect that this was an action by the Starbucks Workers Union, that employees had been treated badly by management, that turnover was at 400 percent, that safety concerns were being ignored, and that paychecks were being tampered with. Britton attempted to get Fostrum to quiet down, but the matter ended in an argument. Saenz returned to work, and shortly thereafter Britton instructed her to pull her till and clock out for the day. He issued the same order to Fostrum. Both employees refused and continued working. Fostrum and Britton resumed their argument.

DM Veronica Park then entered the store and ordered the group of IWW supporters to leave, which they did. Park then instructed Saenz to pull her till and go to the back office, and she complied. Fostrum, Park, and Britton were already there when Saenz arrived. Saenz explained that Britton had told them to clock out and that she felt it was antiunion discrimination. Britton was still upset, and Park encouraged him to calm down. Park decided that both Fostrum and Saenz should return to work and finish their shifts. Toward the end of her shift, Saenz approached Park, who was still in the office, with the letter signed by employees. Park refused to accept it, and Saenz left it on the desk.

2. The IWW's "Nutrition Initiative"

Commencing in about April 2006, the IWW commenced what it termed a "nutritional initiative" in which it openly criticized the dietary value of certain Starbucks products. The Union engaged the services of two individuals to conduct a study of certain menu items. The IWW then issued a press release with their findings. The press release was issued in June 2006, and was initially picked up by Reuters. Gross, who had been involved in this effort, was quoted. This in turn, sparked a certain amount of coverage by other media outlets and IWW supporters including Gross, Malchi, and Saenz were interviewed outside the 57th Street store. The publicity generated by the IWW's efforts in this regard caused Starbucks to coordinate a media response to the Union's allegations, and various memoranda were circulated relating to how the Company should respond to press and employee inquiries regarding this issue.

3. The 14th Street demonstrations

In July 2006, there were several union-sponsored events held at a Starbucks facility at 14th Street and 6th Avenue (the 14th Street store) in response to the suspension of Shift Supervisor Evan Winterscheidt, an employee at the store and member of the IWW.

On July 14, Winterscheidt, along with Bender and Montalbano, and a number of other employees visited the store and attempted to collect signatures on a petition in support of Winterscheidt. As Winterscheidt spoke with coworkers, Montalbano and Bender sat in the café area. SM Mariah Dunham told Winterscheidt that he was not allowed to be there while on suspension, and he left. Montalbano and Bender remained behind. Shortly thereafter, DM Allison Marx arrived at the store. Montalbano introduced himself, stating that he was a member of the Starbucks Workers Union. Marx replied that there was no Starbucks Workers Union. According to a report of the incident provided to Wilk by RD Beckman, Montalbano and Bender tried to continue the discussion, but Marx told them that if they needed to speak with her, her business cards were available at the register. Montalbano and Bender then stood in line, ordered beverages and sat down to read the paper.

On July 15, there was another protest relating to the Winterscheidt suspension, initially attended by Winterscheidt, Bender, and Gross. District Managers Marx and Schueler arrived and, as they were making their way into the facility, Gross had an interaction with Marx, and thereafter received a corrective ac-

[14] Starbucks issued a memorandum addendum in April 2006 detailing these policy changes, which was distributed to partners at all stores covered by the settlement agreement, which included the 36th, 17th, and 9th Street stores. These revised policies were later included in the next published version of the Starbucks' partner guide.

[15] Starbucks had implemented a policy whereby managers were not to accept documents from IWW supporters.

tion for his comments and conduct. The General Counsel has alleged that this corrective action is discriminatory, and the circumstances surrounding this incident will be discussed in further detail below. Later during the protest, others joined the group who were holding signs and handing out leaflets to passersby. At some point the police arrived, entered the store, and consulted with Marx. The police then told the group that they could not demonstrate without a permit. Gross and Montalbano attempted to convince the police otherwise, but were unsuccessful. The group disbanded.

Subsequently, Montalbano was told by DM Karen Schueler that neither he nor Bender would be allowed to enter the 14th Street store. He requested a meeting with Schueler and asked why he would not be allowed in the store. According to Montalbano, Schueler replied that it was not her district, and she didn't know. Schueler, who testified at the hearing, offered no testimony regarding this issue.

Employees continued to leaflet and demonstrate outside the 14th Street store to protest Winterscheidt's suspension. Malchi testified that on one occasion in July he was outside the store, handing out fliers with Fostrum and Winterscheidt. Marx came outside and told Malchi that he could not be in front of the store. Malchi replied that he was allowed to be in front of the store and the leafleting would stop only when Winterscheidt was rehired. On another occasion, Malchi was leafleting with DeAnda, Winterscheidt, and Fostrum. The police arrived and told the group that they could not block the entrance to the store. The officers then entered the store and exited with Marx a few minutes later. They again told the group that they could not block the door, and the leafleters agreed to move further back from the doors.

At some point during this general timeframe, a larger rally was held at the 14th Street store attended by Gross, Bender, Malchi, Winterscheidt, Fostrum, Saenz, and several other IWW members or supporters. The demonstrators wore IWW shirts and buttons; they chanted, held signs, and distributed leaflets. Saenz testified that during this demonstration she observed approximately five Starbucks managers sitting at a table inside the store, near the front, while the protest continued.

4. The Occupational Safety and Health Administration (OSHA) complaint and related press conference

On August 16, 2006, the Union organized a press conference to announce the filing of an OSHA complaint against Starbucks. The Union had alleged that that there was rodent and insect infestation at the Union Square East store. A number of IWW supporters attended the press conference including Gross, Malchi, and Saenz. The IWW had also erected an inflatable rat on the sidewalk several feet from the store and Saenz, DeAnda, Malchi, and Gross each took turns speaking about the alleged infestation. Several mangers including DM Tracey Bryant and McDermet were present as well. McDermet observed portions of the press conference which aired that evening on several local news channels. Following the press conference, Malchi was approached by SM Alicia and ASM Doran who told him that he should have not gone to the media with this issue.

5. Work rules at issue herein

The instant complaint alleges various instances of discriminatory promulgation and/or application of work rules. Two of these are the solicitation and pin rules described above. The complaint additionally implicates a number of other work rules, "best practices" or guidelines, as well.

All store partners are subject to a number of written policies governing their conduct and performance. These are set forth in the partner information and new hire paperwork and partner guide (partner guide) which all partners receive at the inception of their employment.

a. Dress code policy

The partner guide contains a comprehensive dress code, and sets forth in detail the acceptable types of pants, shirts, shoes, hair color, and jewelry that employees may wear. In sum, Respondent's dress code requires employees to wear plain black or white shirts, with a matching undershirt, if an undershirt is worn. Shirts must be clean, pressed, and tucked in. Sweaters may be worn in cooler weather but must be white or black. Pants, trousers, shorts, or skirts must be solid black or khaki. There are additionally certain standards for footwear, socks, or stockings. In particular, shoes must be slip-resistant. Ties or bows are optional, but must be in solid colors. Hats are permitted only if required by State or local laws, or if related to a promotion. Partners are required to wear company-issued aprons which must be kept clean and in good condition. Hair must be clean, brushed and, if long, tied back. Perfume or other highly fragrant body lotions may not we worn; tattoos cannot be visible.

With respect to jewelry, the partner guide provides that:

> Earrings must be small or moderately sized. No more than two earrings per ear may be worn. No other pierced jewelry or ornaments are allowed, including nose rings or tongue studs. Any other jewelry must be kept simple and may not be a distraction.

b. Starbucks guiding principles

The Starbucks "Mission Statement" as set forth in the partner guide provides that partners are expected to "[p]rovide a great work environment and treat each other with respect and dignity."

The partner guide contains a section called "Problem Solving" which addresses disputes between or among partners as follows:

> Starbucks endorses an atmosphere of mutual respect and support. If a partner experiences disagreement or conflict with another partner, the partner should first discuss the problem with the other partner and make every effort to resolve it in a respectful manner. If unsuccessful, the partner should seek the store manager's assistance in resolving the matter respectfully and professionally. In the event the store manager is unsuccessful, the partner may bring the matter to the attention of the district manager and, finally, the Partner Resources team member.

The partner guide also makes reference to M.U.G. (or Moves of Uncommon Greatness) awards, which are presented by one

partner to another in recognition of that partner's efforts and contributions to a particular project or goal. Such awards are manifested in buttons, which the receiving partner wears on his or her uniform. Employees are encouraged to make use of this organizational tool to foster partner morale and create a harmonious workplace.

c. Minimum work requirements

Another section of the partner guide, entitled "Hours of Work" provides, in sum, that partners may be expected to make themselves available for a minimum number of hours or days depending on store needs. A partner's inability or failure to do so may result in separation of employment.

d. Access to facilities by off-duty employees

Respondent additionally maintains a safety, security, and health standard manual. In relevant part, employees are instructed as follows:

> Do not allow non-Starbucks or off-duty partners behind the counter or in the office. Ask the partner to show their partner card and picture identification. The partner in charge must verify this person is a Starbucks partner before allowing the person behind the front counter.

e. "Picking Up" shifts at other stores

According to Wilk, Respondent additionally maintains a "best practice" not allowing employees who are on final warning status to "pick up" shifts at other store locations. This policy is not written in any official manual distributed to employees.

G. Alleged Violations of Section 8(a)(1) of the Act

1. Respondent's policy prohibiting employees from wearing more than one union pin

It is undisputed that, shortly after entering into the March 2006 settlement agreement, Respondent interpreted its obligations there under to require it to allow no more than one union pin per partner per shift. This was confirmed by Wilk and McDermet. In addition, the General Counsel adduced evidence, essentially unrebutted, of several instances where Respondent enforced this policy with respect to its employees.[16] As articulated by Respondent, this rule apparently applies to employees who are present in its stores, regardless of whether they are actively working, on break or in noncustomer areas.

There are two union pins at issue here. One is slightly larger than the other, but both are less than 1 inch in diameter, have red backgrounds, and bear the acronym "IWW" in white letters. The evidence, which includes photographs taken of employees while they are working, establishes that employees may wear numerous pins on their caps or aprons. These consist primarily of M.U.G. pins which employees are encouraged to disseminate to each other to build morale and a harmonious workplace as well as other company-issued pins which are distributed for employee achievement. The IWW buttons at issue are no more conspicuous in size or design than other buttons which are worn by employees on their hats or aprons while working.

Respondent argues that it generated its one-button rule due to instances where employees showed up at work wearing large numbers of pins in various places on their work uniforms. However, Respondent could point to only a few instances where this had been an issue. In particular, Respondent relies upon Smith's testimony that DeAnda arrived at work wearing multiple pins on two occasions. On the first of these occurrences, Smith, after consulting with Wilk, instructed DeAnda to remove all but one of the buttons, and she eventually complied. DeAnda subsequently arrived to work on another occasion wearing multiple buttons. Further, in March 2006, Malchi arrived at work wearing two IWW pins in addition to one other button bearing the caption, "Union Thug."[17]

Wilk testified that she was consulted by various managers regarding the wearing of multiple union pins by employees, and in particular regarding the "Union Thug" pin worn by Malchi. A determination was made that the new pin policy would be interpreted to allow employees to wear one pin that would express their union affiliation in a positive manner.

It is well established that employees generally have the right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945). It is also true, however, that this right is not without limitation. The Board is charged with balancing the conflicting rights of employers to manage their businesses safely and efficiently. Id. at 797–798; *Sam's Club,* 349 NLRB 1007, 1010 (2007). "Thus, an employer may limit or ban the display or wearing of union insignia at work if special circumstances exist and if those circumstances outweigh the adverse effect on employees' Section 7 rights resulting from the limitation or ban." Id. (citing *Albis Plastics,* 335 NLRB 923, 924 (2001); *Mack's Supermarkets,* 288 NLRB 1082, 1098 (1988)). "The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *United Parcel Service,* 312 NLRB 596, 597 (1993) (citing *Nordstrom, Inc.,* 264 NLRB 698, 700 (1982)); see also *Sam's Club,* supra (limitations on the wearing of union insignia have been approved based upon safety concerns and on the employer's need to have neatly uniformed employees as

[16] In late March 2006, shortly after the settlement agreement was entered into, Smith informed Montalbano that management had implemented a new policy regarding pins, and he could wear only one union pin at work. Shortly thereafter, Montalbano wore two union pins while at work and was told to remove one by ASM Richard Wood. According to Montalbano, Wood stated that he had attended a manager's meeting and was told the new policy was that employees were allowed to wear only one pin. Similarly, employee Charles Fostrum wore two union pins while at work and SM Patrice Britton ordered Fostrum to take one off, explaining the one-pin policy. During the fall of 2006, Malchi wore two pins to work and DM Tracey Bryant told him he could wear only one pin and instructed him to take one off or be sent home. Malchi testified to similar experiences with Bryant and SM Cynthia Alicea on other occasions during the fall of 2006.

[17] According to Malchi, this button referenced a comment which had been made by Mayor Bloomberg during the New York City transit strike, and was meant to show solidarity with the transit employees.

part of its public image). Conversely, limitations that are based merely upon an employee's contact with customers or that are overly broad have been found to be invalid. Id.

Respondent contends that its one-button rule is justified by special circumstances, that the implementation was for nondiscriminatory reasons and that it was not applied to employees in a discriminatory manner. In support of this contention, Respondent points to its dress code, as set forth in the partner guide, whose purpose is to ensure that that its partners "present a clean, neat, and professional appearance appropriate of a retailer of specialty gourmet products."

The March 2006 settlement agreement sets forth Respondent's undertakings with respect to its revised pin policy. There is no apparent or implied limitation to one pin per employee per shift. Thus, at the time Respondent settled those underlying unfair labor practice charges, it announced that it would allow employees to wear "buttons" or "pins" unless they "interfere with safety or threaten to harm customer relations or otherwise unreasonably interfere with Starbucks public image." Presumably, this proviso would apply to those situations where employees wore pins containing an offensive message or an excessive number of pins which would create an untidy appearance or create a safety hazard.

The testimony of Respondent's witnesses fails to establish that the one-button rule was promulgated as an extension of Respondent's dress code. Notably, not one witness who testified on behalf of Respondent pointed to this as a rationale for the restrictions imposed. Rather, Respondent's witnesses cited primarily two isolated incidents where an employee wore an unspecified number of buttons and another incident where the message conveyed was deemed offensive. Other references to situations where employees were allegedly "covered" in pins were so vague as to lack probative value. While it is apparent that Respondent encourages its employees to present a certain image to the public, the Company not only countenances, but encourages, the wearing of multiple buttons and pins as part of that image. Thus, employees wear M.U.G and other company-issued pins, apparently without limitation. Judging by the photographs of such employees entered into evidence by the General Counsel, I find that it would not be immediately apparent to a customer that these are company-sponsored pins meant to boost employee morale. Rather, the image conveyed to the consumer is merely that of an employee wearing a variety of pins on their hats and aprons. Respondent seems to have no qualms that the appearance of such an employee would be in contravention of the image which it desires to present to the public. Further, as the Board has held, customer exposure to union insignia, standing alone, is not a special circumstance which allows an employer to prohibit the display of such insignia. *United Parcel Service,* supra at 597 (citing *Nordstrom, Inc.,* supra).

Moreover, Respondent's one-button rule apparently applies regardless of whether the employee is in a selling area or elsewhere in the facility or whether the employee is working or on break. The Board has found that a rule which fails to take such circumstances into account is overbroad. See *Albertsons, Inc.,* 272 NLRB 865, 966 (1984).

Respondent argues that "[i]n virtually every case where the Board has found that the special circumstances exception does not justify an employer's restriction, the employer had imposed a complete ban on employees' rights to wear buttons." It is true that the great majority of cases on this issue involve, as a factual matter, a total prohibition on union insignia, but in at least one case, the Board has found a restriction to one union button to be invalid. Thus, in *Serv-Air, Inc.,* 161 NLRB 382, 416–417 (1966), the Board held that an employer's rule prohibiting an employee from wearing more than one union button at a time was a violation of Section 8(a)(1) of the Act. That situation involved the wearing of large badges and other union propaganda items by civilian mechanics employed by a private contractor at Vance Air Force Base who had been hired to work on advanced supersonic jet engines used to power Air Force planes. The Board affirmed the conclusion of the trial examiner that limiting employees to the wearing of only one union button was a violation of Section 8(a)(1), rejecting the employer's contention that the wearing of union buttons around jet engines constituted a safety hazard.

Respondent additionally argues that there is no evidence of discriminatory intent in the implementation of the one-button policy, or in its application. Even if I were to concur with Respondent on this issue, I note that proof of discriminatory intent or effect is not central to a determination of whether an employer has violated Section 8(a)(1) of the Act. Rather, the standard is whether the employer engaged in conduct which reasonably tends to interfere with the free exercise of employee Section 7 rights. This standard is objective, and the subjective perceptions of individual employees are not taken into account. Moreover, the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not turn on an employer's motive or on whether the coercion actually succeeded or failed. *American Freightways Co.,* 124 NLRB 146, 147 (1959); *Curwood, Inc.,* 339 NLRB 1137, 1140 (2003).

In conclusion, based upon the foregoing, I find that Respondent has failed to demonstrate that there were special circumstances for the promulgation and enforcement of its one-button rule. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act in this regard.

2. The ban on personal use of the bulletin board at Union Square East

As of November 2005, the back room used by employees of the Union Square East store had two bulletin boards. According to Malchi, up until that time one bulletin board had been designated for Starbucks-related material; the other contained notices of a personal nature such as party invitations, announcements of poetry readings, musical performances, and similar material posted by employees. On November 19, the day after employees announced their union affiliation at the Union Square East store, Malchi posted a copy of the letter that had been given to Quintero and a union flier on the board which contained employee material. Later that day, Malchi noticed that both documents had been removed. Remaining at that time was some poetry that had been posted by an employee as well as a flyer for a coworker's art show. Malchi posted copies of the union-related documents again, but by the end of his shift they had

been removed, while other items of a nonbusiness nature remained posted. Prior to clocking out on that day, Malchi yet again posted some union literature. When he next returned to the store, on November 23, he observed that not only was the union literature gone, but all personal items had been removed. In its place was Starbucks-related literature including information regarding benefits and stock options.

Malchi asked SM Quintero why personal items had been taken off the board. Quintero replied that employees are no longer allowed to post anything in the back room. Malchi asked Quintero why, and Quintero replied that this was the rule, he was the manager and this is what he had decided.

Respondent does not dispute that, at one time, employees did post material of a personal, nonbusiness nature on one of the bulletin boards in the back room at the Union Square East store, and that they are no longer allowed to do so. Respondent does, however, dispute the timing of when the change occurred and the motive behind the change. Respondent contends that this change reflects enforcement of its longstanding policy prohibiting the posting of nonwork-related material at its stores, and that it began to enforce the bulletin board policy at the Union Square East store well before employees announced their support for the Union.

In support of this argument, Respondent relies upon Vetrano's testimony that, upon becoming district manager, she reviewed operations at the Union Square East store and advised Quintero that personal material could not be posted in the store and that the bulletin board should be limited to Starbucks' partner information. According to Vetrano, this has been the case at all stores where she has been a manager.[18] Vetrano stated that she had this conversation with Quintero within the first 2 weeks of assessing the store after she became district manager, probably in October 2005. Quintero testified that after Vetrano became district manager, either at the end of September or beginning of October, she visited the store about twice per week. Within 2 weeks, she reviewed standards that were not being followed in the store, which according to Quintero were "store cleanliness, dress code procedures [and] proper procedures in the back room standards."

There is, however, some evidence from Respondent witnesses that places the timing of this change at a later date, after the initiation of open union activity at the store. ASM Kristina Doran offered specific testimony that the no-posting rule began to be enforced right after the "very derogatory" posting of a notice containing the picture of a house (which she believed to be that of either Starbucks CEO Howard Schultz or Jim McDermet) which bore the caption: "How much money does this guy need?" Although Doran could not say for certain whether this was an IWW flier, she did acknowledge that this posting occurred at around the time that union flyers were being posted at the store. In addition, on cross-examination, Quintero acknowledged that that he saw a picture of a house on the partner bulletin board after the "standards and procedures" began to be enforced, and that this occurred shortly after the Black Friday protest took place.[19]

In any event, I credit Malchi about the timing of when this change took place. He offered factually detailed, specific testimony about the nature of the material that was removed from the bulletin board, and the dates on which this occurred. Moreover, his account is corroborated by Doran, who testified in a very straightforward manner that the enforcement of the no-posting rule occurred after a derogatory posting of a high-level Starbucks' manager appeared on the bulletin board, and that this occurred at the time employees were posting IWW literature. I find, therefore, that the change in the bulletin board policy occurred at a time that union activity at the Union Square East store was widely known.[20]

It is clear that employees do not enjoy an unfettered Section 7 right to access and use an employer's bulletin boards, provided that an employer's restrictions are nondiscriminatory. *Register-Guard,* 351 NLRB 1110, 1114 (2007), and cases cited therein. Here, Respondent argues that the General Counsel cannot show either that its rule was promulgated in response to union activity or that it targeted only union-related postings. Respondent asserts that its policy limits the use of its bulletin boards to the posting of information pertaining to Starbucks; thus, partners may not post invitations to a party or flyers advertising a car. According to Respondent, managers routinely take down posts that are not Starbucks' related. And, as noted above, Respondent further contends that this policy was enforced well before the Union announced its support within that store on November 18, 2005.

As an initial matter, the evidence fails to establish that, during the relevant timeframe, Respondent maintained a blanket rule prohibiting the posting of all non-Starbucks-related material. The partner guide in which was in effect during the relevant time frame contains (in pertinent part) the following provision:

> Distributing Notices/ Soliciting
>
> Posting or distributing notices or other written materials on Starbucks property at any time, without prior approval from your manager, is strictly prohibited.[21]

[18] Respondent additionally cites to Gross' testimony that as early as 2004, employees were not allowed to post personal items at the 36th Street store, and that management was allowed to post Starbucks-related material only. Gross also testified, however, that prior to the representation petition being filed, employees had been allowed to post items of a personal nature at the store. Gross made specific reference to the posting and distribution of invitations to a club called "Hot Love." According to Gross, this flyer was distributed to employees and to the store manager as well.

[19] Quintero also recalled taking down an invitation to a Halloween party; however, he did not state whether this occurred prior to or after Halloween. Moreover, I note that Respondent was aware by this time that the Union was using employee-sponsored parties as an organizing tool.

[20] I further note that, when testifying about the new standards implemented by Vetrano, Quintero failed to specify the bulletin board policy, and only did so after being asked by counsel for Respondent whether he had any discussions with Vetrano about the bulletin board policy in the store.

[21] As noted above, as a result of the March 2006 settlement, Respondent revised this policy to prohibit the distribution or posting in any work areas of any printed material such as notices, posters, or leaflets.

Thus, Starbucks' official policy at the time was not that all personal postings were prohibited per se, but that they were subject to management approval.[22] In any event, the evidence is unrebutted that, prior to a certain date, Quintero had freely allowed employees to post items of a personal nature, and had permitted the use of a bulletin board for such a purpose. Further, while Respondent argues that the change predated knowledge of union activity at Union Square, I find that the weight of the credible evidence, as discussed above, suggests the opposite conclusion: that the new rule was promulgated subsequent to the initiation of open union activity at the store.

In *Register-Guard,* supra, the Board found that an employer did not violate the Act by maintaining a policy prohibiting the use of the employer's e-mail system for "all non-job related solicitations," which encompassed Section 7 activity. In that case, the employer had previously permitted personal e-mail solicitation, but had not permitted e-mails soliciting support for any outside group or organization in the past. The Board majority concluded that the union was an outside organization and found that the employer had lawfully enforced its policy.

Relying upon earlier Board decisions regarding the use of employer-owned bulletin boards, copying machines, telephones, and other equipment, the Board majority reaffirmed that there is "no statutory right to use an employer's equipment or media, as long as the restrictions are nondiscriminatory." Thus, under this standard, an employer may lawfully bar access to its property (i.e., bulletin boards) "unless the [employer] acts in a manner that discriminates against Section 7 activity." The Board then next considered whether, having permitted employees to use the e-mail system for purposes not related to work, the company could lawfully prohibit its use for union-related purposes. In finding that the company's actions in this regard were not unlawful, the Board majority modified extant law on what constitutes discriminatory enforcement by adopting the analysis of the Seventh Circuit,[23] where the circuit distinguished between personal, nonwork-related postings on a bulletin board, such as for sale notices and wedding announcements, and group or organizational postings such as union materials. The Board held that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status. However, the Board majority also noted that "if the evidence showed that the employer's motive for the line-drawing was antiunion then the action would be unlawful." *Register-Guard,* supra at 1118 fn. 18. Thus, the Board made clear that it was not altering well-established principles prohibiting employer rules that discriminate against Section 7 activity.

Here, Respondent has prohibited all non-Starbucks material, not just union-related postings. Nevertheless, I find that Respondent's contention that it was neutrally applying a long-standing rule is not supported by the evidence. Rather, the evidence suggests that, at least at the Union Square East store, Respondent's stated policies had either been unenforced or applied in a very liberal manner by store management prior to the change alleged to be unlawful. Further, Respondent's contention that its no-posting rule was announced before it had knowledge of union activity is similarly unsupported by the evidence. Rather, the evidence, including the timing of the announcement, establishes that Respondent promulgated such a rule directly in response to open union activity at the Union Square East store.

Eaton Technologies, Inc., 322 NLRB 848, 853 (1997), cited by the Board in *Register-Guard*, involved a circumstance where the respondent maintained a policy requiring permission prior to the posting of personal material. It was uncontested that the employer permitted two of its bulletin boards to be used for the posting of personal notices by employees, and there was further no dispute that the respondent never enforced its policy requiring permission to post notices until after the union campaign began. Shortly after the union campaign commenced, union-related postings were removed, but other personal notices were allowed to remain. Thereafter, the bulletin boards were enclosed in glass and Respondent allowed only work-related notices to be posted. In that circumstance, the administrative law judge, affirmed by the Board, found that the respondent had violated Section 8(a)(1) by removing and destroying union literature and by disparately enforcing its bulletin board policy.

Here, as in *Eaton Technologies,* supra, Respondent previously allowed employees to post notices of a personal nature, notwithstanding a rule requiring that they first obtain permission to do so. Once union literature began appearing on the bulletin board, it was selectively removed. Then, the prohibition was expanded to include all notices of a personal nature, and only employer-sponsored material was permitted. In my view, such actions evidence the sort of discriminatory motive discussed by the Board in *Register-Guard,* supra. Moreover, the instant case is dissimilar to *Register-Guard* in that it does not involve an alleged disparate enforcement of a written company-wide policy with facially neutral language. Instead, there was an unwritten policy at the Union Square East store that was abruptly changed in response to the Union's organizing campaign. Accordingly, I conclude that by adopting and enforcing a policy banning personal use of the bulletin board at its Union Square East store, Respondent violated Section 8(a)(1) of the Act.

3. The alleged unlawful prohibitions on talking about the Union

As noted above, in the March 2006 settlement, Respondent agreed to promulgate and enforce a revised no-solicitation rule which, in relevant part, prohibits employees from engaging in solicitation during working time or the working time of the employee being solicited.

Wilk testified that, beginning in March 2006, Respondent's policy was that employees may not solicit in any work area, without exception. She further testified that she has told managers to apply the policy in that fashion. When asked whether that prohibition would apply to talking about the Union, her answer was: "I guess that would depend on the situation." Wilk

[22] I cite this provision only to show what Respondent's stated policy was at the time in question, and do not offer any opinion on whether the policy, taken as a whole, was a lawful one.

[23] *Fleming Co.*, 349 F.3d 2968 (7th Cir. 2003), denying enf. 336 NLRB 192 (2001); *Guardian Industries*, 49 F.3d 317 (7th Cir. 1995), denying enf. 313 NLRB 1275 (1994).

offered no further clarification of what she meant by that remark.

The General Counsel has alleged that, commencing in about March 2006, under the guise of this no-solicitation policy, Respondent has maintained and enforced a rule prohibiting employees from discussing the Union while allowing them to discuss other subjects which are unrelated to work. Shift Supervisor Aiesha Mumford testified that in March 2006 she was temporarily assigned to work at Union Square East. She noticed a pin that Ayala was wearing. Mumford did not know what it signified at the time, but expressed admiration for it. Ayala gave her a pin, which was an IWW pin, which Mumford placed on her hat. Some time later, Mumford was called into the back by ASM Doran, who explained what the pin signified. According to Mumford's testimony, which was unrebutted by Doran, Doran explained what the Union was about and told Mumford that she could not tell her not to wear the pin. Doran also told Mumford that people at that location were part of a union and they are not allowed to promote or try to have people join the Union while at work. Mumford removed the pin prior to the completion of her shift.

In April 2006, Malchi was working alongside borrowed partner Daniel Schwartz. According to Malchi, the two talked about working conditions at Starbucks, the Union, sports, and possibly getting together outside of work. Malchi asked Schwartz for his phone number. Management was present on the floor throughout. As Malchi was done with his shift, Quintero told him that Vetrano had asked him to speak with Malchi about his conversations with Schwartz. Quintero said that Malchi had solicited Schwartz and that he was not allowed to talk about the Union while working. According to Quintero, Schwartz later complained to management about Malchi's actions and stated that he no longer wanted to work at the store.[24] Respondent asserts that, even if Malchi's discussion with Schwartz did not technically rise to the level of solicitation, it nevertheless was entitled to address this conduct in light of alleged "interference with operations."

Quintero testified that, from his standpoint, employees cannot have a conversation about the Union even when not busy because it is considered solicitation. Quintero added that employees may discuss the Union while on their breaks, in the lobby area. Quintero further explained that employees may have conversations about various topics, as long as the customer is connected to it. When there are no customers, employees may discuss things that are going on in the store, and matters such as i-tunes, music, movies, and books. Once a customer comes for service, however, employees are expected to focus on taking care of the customer.[25] Malchi, generally corroborated by Ayala, testified that during shifts he engaged in numerous conversations with Ayala about family life, children, and traveling. According to Ayala, while working, she and her coworkers spoke freely about relationships, religion, problems, and bills. As Ayala testified, various members of the store's management staff were aware of these discussions and participated in them as well.

On May 3, RD Beckman accused Malchi of "constantly" talking about the Union after being told not to, and advising him that if he persisted in doing so he would be terminated.[26] Later that month, as Malchi was receiving a final written warning from Vetrano and Beckman, he was told that discussing the Union and working conditions constituted verbal solicitation. Beckman told Malchi that once he was on the clock he could not do anything that makes anyone feel uncomfortable or ask for anything from anyone. Beckman added that talking about the Union was harassment. Beckman testified that she told Malchi that he could not speak about the IWW while on the floor while working. She also stated that she told Malchi that it didn't matter what the topic was, the customers needed to be served. If he was on break, or off duty, his conversations were his business.

Doran acknowledged during her testimony that at times Malchi was working at the bar discussing union matters and she would tell him to refrain from doing that until he took a break. Doran testified that she did so because, although she could not remember any particular incident, she felt that the comments Malchi made were inappropriate to helping customers.[27] In its brief, Respondent argues that to the extent Doran prohibited Malchi from discussing the Union, it was because he was doing so while working, and the discussion was interfering with his service of customers. Neither Doran, nor any other manager, however, presented any testimony relating to a specific instance where there was interference of service caused by Malchi's discussions of any topic with his coworkers. Similarly, there is no specific evidence to support Respondent's assertion, as set forth in its brief, that Malchi's conduct disrupted store operations more generally.

According to Montalbano, in April 2006, he and DeAnda were called into the back room for a conversation with District Managers Will Smith and Karen Schueler. Smith said it had come to their attention that the employees had been talking about the Union while on the clock. Smith said that such conversations were solicitation, and would have to stop. Montalbano asked Smith to define solicitation, and asked what he is supposed to do if someone asks him about the pin on his apron. Smith replied that Montalbano could state that it is a union pin, but give no further information, as that would be solicitation. At this point, Schueler said that Montalbano should consider how nonunion partners feel, that it makes them feel uncomfortable at work when there is talk about the Union. DeAnda asked Smith if he could further define solicitation. According to

[24] Schwartz did not testify; nor was any incident report or any other documentation of his alleged complaint offered into evidence.

[25] At another point in his testimony, Quintero asserted that he told partners that they could not have personal conversations behind the counter. He claimed to have told employees that they could not discuss a party, but could not remember when this occurred. I do not credit this testimony as it is inconsistent with all the other evidence adduced on this issue, and further note Respondent does not assert that its policy is to prohibit all personal conversations, only what it deems to be "solicitations."

[26] This conversations described here took place in the context of written discipline issued by Respondent to Malchi, which has been alleged to be unlawful and is discussed below.

[27] The record contains evidence that Malchi also distributed union literature while working. These instances will be discussed below.

Montalbano, DeAnda queried whether asking a coworker out to dinner would be the same sort of solicitation as talking about a union meeting. Smith told DeAnda not to play games with him: if she asked a coworker out to dinner it is not solicitation; if she talked about the Union; then it was solicitation.

Respondent argues that an adverse inference should be drawn from the fact that DeAnda, a union supporter, was not called by the General Counsel to corroborate Montalbano's testimony. I note, however, that Schueler, who did testify, was not asked about this encounter. In addition, Smith admitted that in April 2006 he was party to a conversation where Montalbano asserted that Smith's interpretation of the settlement agreement was incorrect, and that he could talk about the Union from a support standpoint while working. According to Smith, he replied that Montalbano could not do that, but that he could discuss whatever he wished on breaks, lunch or before or after work, but not while working at the store. Based upon Montalbano's credible demeanor and his detailed account of this aspect of the conversation, the fact that Schueler provided no rebuttal testimony and Smith's corroboration of the essence of the discussion, I credit Montalbano's account of this conversation.

In the instant case, the General Counsel does not claim that the no-solicitation rule promulgated by the Respondent is unlawful; the thrust of the General Counsel's argument is that by forbidding discussions relating to the Union, while allowing employees to speak about other nonwork subjects during worktime, Respondent has violated the Act.

Respondent asserts that, to the extent it restricted partners in discussing the Union, it did so in accordance with the terms of its policy which prohibits employees from engaging in solicitation while they or the partner they are soliciting are working. Respondent further notes that its managers frequently told employees that they were free to discuss union-related matters while they were on break or off duty at its stores. Respondent further argues that its no solicitation policy was consistently enforced with regard to nonunion solicitations and, even if it could be proven that in certain isolated instances Respondent tolerated partners engaging in this type of selling, under *Register-Guard*, supra at 11119, this would not amount to a violation of the Act absent evidence of discriminatory enforcement.

With regard to the General Counsel's argument that Respondent has prohibited mere talk rather than solicitation, Respondent, citing *Washington Fruit & Produce Co.,* 343 NLRB 1215, 1219 (2004), argues that the Board has recognized that an employee may be engaged in solicitation by merely speaking in favor of a union where the employee is trying to "persuade fellow employees to support [the union] cause." Further, Respondent contends that even if certain employee discussions did not constitute solicitation, the Board has acknowledged that employers do not violate the Act by limiting discussion of union activities where such discussions disrupt the employer's business or interfere with the employees' performance of their work. In support of this contention, Respondent cites *Adco Electric, Inc.,* 307 NLRB 1113, 1117–1118 (1992), for the proposition that if the conduct in question, whether deemed a solicitation or not, results in or has the potential for disruption, then the employer can properly discipline its employees as a result. Finally, Respondent contends that any argument that it violated the Act by prohibiting union talk while allowing other subjects to be discussed must fail: "It is one thing, for example, to 'talk' to fellow employees about Sunday's football game. It is quite another to try to 'persuade' fellow employees to support a cause. The former is allowed. The latter is not . . . ." *Washington Fruit & Produce Co.,* supra at 1219.

In agreement with the General Counsel I find that the evidence supports the conclusion that Respondent has consistently interpreted its no-solicitation rule to be the functional equivalent of a no-talking rule. The evidence adduced in the record demonstrates that when managers overheard conversations relating to the Union, or merely received third-hand reports of such discussions, employees were counseled that such talk was tantamount to solicitation, or was deemed to be harassment of other employees, and should cease, regardless of the actual content of the conversation at issue, regardless of the length of the discussion or whether it interfered with company operations.

The Board has held, however, that there is a distinction between solicitation for a union and "talking about a union or a union meeting or whether a union is good or bad." *Wal-Mart Stores,* 340 NLRB 637, 639 (2003) (quoting *W. W. Grainger*, 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978)). Here, Respondent's rule was applied to employees regardless of whether they were actually soliciting other employees to join the Union or merely discussing the Union. Obviously, Respondent can lawfully make customer service a priority, but there is no direct, probative evidence that employees were prohibited from engaging in discussions relating to other matters with their coworkers while serving customers or doing other assigned tasks, and I note that Respondent has not asserted that this is the case.

It is well settled that "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to their subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discussion unionization, but are free to discuss other subjects unrelated to work . . . ." *Jensen Enterprises,* 339 NLRB 877, 878 (2003). Further, in considering whether communications from an employer to its employees violate the Act, "the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. The board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006) (quoting *Miller Electric Pump & Plumbing,* 334 NLRB 824 (2001).

Applying those principles here, I find that the credible evidence establishes that social discussions were allowed among employees while they were working at the bar. Quintero admitted that when not busy, employees discuss a variety of topics. Further, the testimony of Malchi and Ayala, which was unrebutted, was that they regularly discussed various subjects while on shift.

Moreover, there is no evidence of any other enforcement of a rule against talking while working. Various witnesses testified that the purpose of the no-talking rule was to ensure that that

the customers were to come first, however, there is no evidence that any of the union-related discussions at issue here distracted employees from serving customers. Indeed, as the Board has noted, an employer's request that one employee stop distracting another employee from his work can reasonably be understood as "merely curbing social discussions during a busy period." *Scripps Memorial Hospital Encinitas,* supra at 53. Here, the remarks made to employees would reasonably be interpreted to mean that discussion of the Union was not allowed at any time while behind the bar, even though other nonwork conversation was permitted there. See also *Emergency One, Inc.,* 306 NLRB 800 (1992) (respondent unlawfully restricted conversations about the union during worktime while permitting other conversations including those about nonwork matters); *ITT Industries,* 331 NLRB 4 (2000) (respondent's instruction not to engage in any discussion of the union with any employee unlawful where employees were, notwithstanding rule in employee handbook prohibiting all solicitations during working time, allowed to engage in discussions and solicitation on the production floor).

Washington Fruit & Produce Co., supra, relied upon by the Respondent, is distinguishable from the circumstances herein. There, the Respondent maintained a rule, which was unchallenged by the General Counsel, which prohibited "approaching fellow employees in the work place regarding activities, organizations, or causes, regardless of how worthwhile, important or benevolent." The rule further provided that "[n]o employee shall solicit or promote support for any cause or organization during his or her working time or the working time of the employee or employees at whom such activity is directed." The Board majority concluded that discipline issued to employees for violating this rule was not unlawful. In doing so, the Board rejected the determination of the administrative law judge that the employees had engaged in mere talk that did not rise to the level of "solicit[ing] or promot[ing] support for any cause or organization." Rather, the Board found that that the conduct of the employees in question "clearly fell within the ambit of the rule." 343 NLRB at 1219. Because the conduct at issue was subject to this rule, the fact that the respondent had tolerated "talk" in the workplace did not warrant a contrary result. Id. Of import in that case was that the Board specifically noted that the respondent therein permitted employees to talk among themselves while working, *without restriction as to subject matter*, so long as their personal discussions did not rise to the level of solicitation or promotion within the meaning of the rule.

Here, the unrebutted evidence establishes that Respondent does not prohibit, and has allowed employees to talk generally about nonwork matters during worktime but has specifically prohibited employees from talking about the Union under similar circumstances, regardless of the content of the conversation. Accordingly, by issuing a blanket prohibition against discussions of the Union while on worktime, while allowing employees to talk about other nonwork matters, Respondent has violated Section 8(a)(1) of the Act. *Scripps Memorial Hospital Encinitas,* supra; *Jensen Enterprises,* supra.[28]

4. The alleged prohibition on discussions of working conditions

In support of its contention that Respondent unlawfully prohibited discussions of working conditions among employees, the General Counsel cites to two instances: a discussion among Montalbano, DeAnda, Schueler, and Smith (which has been discussed in some detail above) and another between Fostrum and DM Veronica Park.

According to Montalbano, at some point during the April 2006 discussion with Schueler and Smith relating to solicitation, he told Smith that the Act gave employees the right to talk about wages and working conditions as long as it didn't interfere with work. Smith stated that wages are a private issue and Montalbano is not supposed to talk about them.[29] Smith testified that at some point in April 2006, Montalbano came to him and stated that wages had increased due to the IWW efforts. Smith replied that wages are increased almost every year. Smith was specifically asked by counsel for Respondent whether he ever told Montalbano that he was not permitted to speak about wages or working conditions with other Starbucks partners. Smith replied, "I told him again the same thing. We don't discuss pay. People are hired on their performance, their experience, background and that's it."[30] Respondent contends that by making such comments, Smith was telling Montalbano merely that managers could not discuss the basis for setting or increasing employees' rates of pay. However, Smith was specifically responding to a question from counsel relating to what he had told Montalbano regarding his discussions of wages with other partners, and not about any constraints imposed generally upon managers about discussing wages with employees. Accordingly, I find that Respondent's suggested interpretation of Smith's comments is not supported by the record as a whole.

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. *Flamingo Hilton*

[28] The General Counsel has also alleged that Respondent unlawfully prohibited employees from discussing the Union while off duty. This is discussed in connection with the allegations of the complaint regarding Daniel Gross, below.

[29] Montalbano admitted that his recollection of this aspect of the discussion was incomplete. Respondent contends that this testimony was elicited through the use of leading questions. I note, however, that the General Counsel established that Montalbano's recollection of discussions about wages and working conditions was exhausted prior to asking the specific question regarding whether it was stated that they were a "private issue." In any event, as the Board has noted, testimony elicited through the use of leading questions may be credited. *Millard Refrigerated Services*, 345 NLRB 1143 (2005); *W & M Properties of Connecticut*, 348 NLRB 162 (2006). As I found Montalbano's testimony generally to have the ring of truth, I credit it notwithstanding some lapses in his recollection.

[30] Although not specifically alleged herein, there is evidence that Montalbano was told on a subsequent occasion, this time by SM Chris Salinas, that he should not discuss a wage adjustment with his coworkers, as it would confuse them. Montalbano was instructed to refer inquiries to store management.

Laughlin, 330 NLRB 287, 292 (1999); *Koronis Parts,* 324 NLRB 675, 686, 694 (1997); *Vanguard Tours,* 300 NLRB 250, 264 (1990), enfd. in relevant part 981 F.2d 62 (2d Cir. 1992). See also *Scientific-Atlanta, Inc.,* 278 NLRB 622, 624–625 (1966) (wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds"). Accordingly, by admonishing Montalbano that "wages are a private issue" and that "we don't discuss pay" Respondent has violated Section 8(a)(1) of the Act.

The General Counsel has cited to another instance where it is alleged that Respondent violated the Act in a similar fashion. This allegation concerns an occasion where Fostrum was involved a dispute with his shift supervisor where each claimed that the other had pushed them inappropriately. Park instructed Fostrum that he was not to discuss the matter further with the shift supervisor. The General Counsel contends that by issuing such an instruction Park was prohibiting Fostrum from discussing store safety. I find, however, that Park's limited direction to Fostrum that he was not to discuss the disagreement with the shift supervisor did not amount to an unlawful prohibition on discussing working conditions. See *Snap-On-Tools, Inc.,* 342 NLRB 5, 10 (2004) (instruction not to discuss altercation with coworker held not to constitute an unlawful prohibition on the discussion of working conditions, where prohibition is limited to that one-on-one dispute and did not implicate any other matter affecting terms and conditions of employment).

5. The alleged restrictions on use of the "back room" at Union Square East

The complaint alleges that, from November 2005 through March 2006, off-duty employees were unlawfully prohibited from entering the so-called "back room" of the Union Square East store. This room contains excess inventory, refrigerators, a sink, a telephone, a computer, the safe and, as noted above, the company bulletin boards. Employees use the room to perform certain work-related tasks such as counting their till, totaling the deposit, ordering products, and answering the phone. Both Malchi and Ayala testified that prior to the November 18 announcement of union support at the Union Square East store, off-duty employees were granted access to the so-called "back room" of the store and would go there to check their schedules, pick up their paychecks or tips, and wait for coworkers to get off work. As Ayala testified, Assistant Store Managers Doran, Martinez, and Gomez would be present and socialize with employees as well. At some point in late November, it was announced that access to the back room was restricted to off-duty employees. When such employees came by to check their schedules or get their wages, they were required to wait in the café area for their schedules or wages and tips to be brought out to them. Malchi testified that one day during that period of time, he went to the store and was stopped by Doran, who asked Malchi if he was scheduled to work that day. When Malchi replied that he was not, Doran advised him that he was not allowed in the back room. Malchi asked if this was a new policy, and Doran replied that this was the rule and it was being enforced. Consequently, Malchi waited for Doran to bring him his schedule, which he reviewed in the café area. Doran acknowledged that she did stop off-duty employees from entering the back room; however, she could not recall when she began implementing this policy. According to Malchi, this rule was routinely enforced until March 2006, at which time off-duty employees were once again granted access to the back room.

Vetrano testified that for safety and security reasons partners are not allowed in the back room when off duty, and that such a rule had been enforced at all stores where she has been a manager. Wilk testified that she was not sure there was a company rule pertaining to the use of the back room while off duty. She was consulted prior to the implementation of the policy at the Union Square East store but could not provide specific testimony about when this change was implemented.

There was no rebuttal offered by Respondent to Malchi's testimony that such a restriction no longer exists at Union Square East, and has not been in effect since some time in March 2006.

The General Counsel argues that the implementation of this policy was designed to restrict the access of prounion employees to their coworkers. Respondent argues that the back room policy is consistent with its safety manual, and is part of an overall effort to ensure partner safety and store security. As Respondent asserts, this policy is part of an overall plan designed to protect partners and customers from injury and to protect company assets and potential disruptions to its business.

According to Respondent, Starbucks' policy has consistently prohibited employees from entering the back room while off-duty. Respondent cites to its safety, security & health standard manual which provides in relevant part as follows:

> Do not allow non-Starbucks or off-duty partners behind the counter or in the office. Ask the partner to show their partner card and picture identification. The partner in charge must verify this person is a Starbucks partner before allowing the person behind the front counter.

Respondent maintains that there are valid reasons for enforcing this rule. As noted above, the safe is located in the back room and partners perform tasks there involving sums of money. Doran testified that she once made a significant monetary error while filling out a deposit form because she was distracted by employees present in the back room.

In addition, Respondent maintains that Respondent began enforcing this rule prior to the union announcement. However, both Malchi and Ayala offered specific testimony that the change in policy occurred after the union announcement at the store and the testimony of Respondent's witnesses fails to convince me to the contrary. Vetrano testified that shortly after assuming the management of the store, she met with Quintero and told him that they had to reestablish guidelines regarding basic cleanliness, sanitation and dress code. Vetrano further testified that while meeting with all store managers under her supervision she stated that they would be "going back to basics" with regard to dress code, cash logs and having stores cleaned correctly. Vetrano failed to mention anything about a back room policy until specifically questioned by Respondent's counsel. Vetrano then testified that she spoke to Quintero about the need to enforce the no-access rule. Quintero's initial testimony was that Vetrano spoke to him about enforcing the "back room standards" among other policies such as dress code and

cleanliness standards after about 1-1/2 weeks after she first reviewed store operations. However, Quintero subsequently testified that Vetrano, "[S]aid we had to follow dress code policies and standards and stuff like that . . . after they had addressed that they were forming a union." Wilk and Doran both testified that the policy regarding access to off-duty employees was changed, but neither could testify when this policy began to be implemented. Thus, the testimony of Respondent's witnesses on when this rule began to be enforced is, at best, vague.

In agreement with the General Counsel, I find that the restrictions on access to the back room were enacted with an antiunion motive. I credit the straightforward testimony of both Malchi and Ayala that the enforcement of the no-access rule commenced after the union announcement at the Union Square East store. I further find their testimony to be supported by the evidence as a whole, and the logical inferences to be drawn from the record. In particular, I note that Vetrano failed to specify this as one of the early changes she wished to make until prompted to do so by counsel and Quintero in his cross-examination tied the increased enforcement of various rules to the advent of union activity at the store. Moreover, I note that this change in policy did not occur in isolation. As I have found above, Respondent took a series of actions with the apparent intended effect of reducing employees' opportunity to communicate with each other or otherwise engage in protected conduct while at the workplace. Such actions, which all occurred shortly after the announcement of union support at the Union Square East store, evince a discriminatory motive. The Board has long held that the imposition of a new rule, or the more stringent enforcement of an old rule, in response to union activity is unlawful. *Old Angus Inc. of Maryland,* 212 NLRB 539 (1974).

Moreover, even if I were to find that Respondent has put forth valid reasons to restrict employees' access to the back room when off duty, Respondent has failed to explain why, beginning in March 2006, it ceased enforcement of this rule, and went back to its original practice of allowing off-duty employees to enter the back room. This reversal undermines Respondent's argument that the initial restriction was driven by established company policy and is necessitated by safety and security concerns.[31] I further note that there is no evidence that any manager ever explained to employees why they were no longer allowed in the back room when off duty. In addition, other than the one incident testified to by Duran where she made an accounting error, Respondent has offered no evidence to show that there was any breach of security or safety caused by employees' presence in the back room that would warrant or necessitate such a change.

Accordingly, I find that by prohibiting employees from entering the back room of its Union Square East while off duty, Respondent engaged in conduct which violates Section 8(a)(1) of the Act.[32]

H. The Alleged Violations of Section 8(a)(3) of the Act

1. The *Wright Line* standard

Allegations of discrimination which turn on employer motivation are analyzed under the framework set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation of Section 8(a)(3) under *Wright Line,* the General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. *Wright Line,* supra; *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding, Inc.,* 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004); enfd. mem. 179 LRRM 2954 (6th Cir. 2006); *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003). The Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. See *McClendon Electrical Services,* 340 NLRB 613 fn. 6 (2003) (citing *La Gloria Oil Co.,* 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003). As part of its initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.,* 339 NLRB 946, 949 (2003); see also *Laro Maintenance Corp. v. NLRB,* 56 F.3d 224, 229 (D.C. Cir. 1995). In addition, proof of an employer's animus may be based upon circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.,* 342 NLRB 1131, 1135 (2004).

Once the General Counsel has made out the elements of a prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste*, *Inc.,* 346 NLRB 494, 496 (2006); *Williamette Industries,* 341 NLRB 560, 563 (2004); *Wright Line,* supra. To meet its *Wright Line* burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

2. Alleged disparate enforcement of Respondent's dress code

The complaint alleges that Respondent disparately enforced its dress code with respect to both Ayala and Malchi and, further, issued discipline to them pursuant to such disparate enforcement, in violation of Section 8(a)(1) and (3) of the Act.

[31] As the General Counsel further asserts, the cited provisions of Respondent's safety manual do not strictly prohibit off-duty employees from entering certain areas of the store. They do, however, require that such employees show their partner card and picture identification before being allowed behind the counter. The General Counsel argues that the fact that Respondent did not follow its own announced policy is an indication of unlawful motive.

[32] Other alleged violations of Sec. 8(a)(1) are discussed below.

The record establishes that before Vetrano became the DM for the Union Square East store, enforcement of various aspects of Respondent's dress code at that location had been lax. Employees did not wear undershirts which matched their shirts, tattoos were visible, shoes and pants were not in compliance with dress code requirements, and various employees wore large rings, bracelets, and necklaces. Both Vetrano and Quintero testified that, when she initially reviewed operations at the store, Vetrano stated that the dress code policy had to be more strictly enforced. The record establishes that thereafter the dress code was more strictly enforced with respect to all employees. For example, Malchi testified that ASM Edwin Gomez told ASM Jeremiah Martinez, who was working at the bar, to cover his tattoo. He also observed that when an employee came to work with pants which failed to comply with the dress code, Quintero gave her money to buy new pants, which she did. Doran similarly testified that she was told that jewelry she wore was not in compliance with the dress code. She was reprimanded for wearing earrings larger than a quarter, and multiple bracelets. Quintero testified that he told an employee repeatedly to tuck in his shirt, and another to change her shoes to comply with the dress code. Vetrano instructed Quintero to tell this same employee to remove her earrings because they were too long and distracting.

With regard to jewelry in particular, the dress code directs that jewelry must be moderately sized, kept simple, and may not be a distraction. The record establishes that, since August 2002, Ayala has worn a pentagram necklace which is about 1-1/2 inches in diameter. According to both Ayala and Malchi, she consistently wore it while at work. Out of curiosity, Malchi asked her what it signified, and she told him it was a Wiccan symbol. According to Ayala, all managers at Union Square saw her wear the pentagram; and Malchi testified that she discussed its religious significance with her coworkers and managers.

Ayala testified that, on about December 15, 2005, Quintero told her to remove her necklace or to tuck it in. Ayala questioned why, after all this time, she was being required to tuck in her necklace. Quintero said it was against Starbucks' policy to wear religious objects. Ayala argued that the policy only prohibited distracting jewelry and Quintero then said that the necklace was too big. According to Malchi, Ayala emerged from her meeting with Quintero visibly upset, stating that she had been told that the pendant was a religious object and could not be worn. Malchi and Ayala, accompanied by a coworker referred to as "Tina G," who was wearing a cross at the time, went to speak with Quintero. Quintero reiterated that the pentagram was a religious object and could not be worn. When confronted with the obvious, that another employee was wearing a religious object without objection, Quintero stated that Ayala's pendant was too large, that Vetrano believed it signified devil-worship and didn't want it worn in the store. Ayala continued to wear her pendant outside her uniform and was sent home for the day, although she was compensated as if she had worked a full day.

The next incident regarding Ayala's pentagram occurred on February 7, 2006, several days after Ayala had participated in leafleting outside the Union Square East store, SM Jeremiah Martinez called Ayala aside, and told her she should either remove or tuck in her pendant. Ayala refused to do either and was issued a corrective action, and sent home, for failing to do so.

Before Ayala left, she gave the pendant to Malchi, who put it on. Martinez instructed Malchi that he had a choice either to tuck in the pendant or be sent home for the day. Malchi had a telephone conversation with Vetrano in which he stated that he was too upset to continue working and wished to leave. According to Malchi, Vetrano said he could leave. Malchi received a corrective action for his role in the pentagram incident. The corrective action is dated February 15, however, it was apparently presented to Malchi at a later date, and in conjunction with other discipline, as described below. Although Malchi testified that Vetrano had told him that he would not be disciplined for this incident, such testimony is contradicted by Malchi's journal where he acknowledges that Quintero had told him that he would be receiving written warnings for being out of dress code and for insubordination. In addition, Malchi admitted that Quintero attempted to meet with him to discuss the warning, but he told Quintero he was in a hurry and had to leave.[33]

The General Counsel contends that Ayala and Malchi were discriminatorily singled out for enforcement of Respondent's dress code and that the disciplinary actions they received were issued in retaliation for their open union support. Respondent contends that, after Vetrano became district manager, she insisted upon stricter enforcement of the dress code and that, thereafter, the policy was applied to all employees. Respondent argues that neither Ayala nor Malchi were singled out for discriminatory treatment. Respondent further contends that Ayala's pendant, due to its size, constituted a potential safety hazard, and that both employees were disciplined for insubordinate behavior.

The evidence establishes that both Ayala and Malchi were open union supporters who participated in protests, demonstrations, leafleting, and press conferences in support of the Union. There is additionally ample evidence that Respondent was aware of these activities. Moreover, the timing of Respondent's admonitions to Ayala, coming shortly after her open participation in protected conduct, supports an inference that her union activities were a motivating factor in Respondent's actions toward her. However, in disagreement with the General Counsel I find that there is insufficient evidence to establish that either Ayala or Malchi were singled out for stricter enforcement of the dress code or issued subsequent discipline as a consequence of disparate enforcement of Respondent's dress code. Thus, assuming that I were to conclude that the General Counsel had established a prima facie case of discrimination, I find that the evidence as a whole fails to establish that Respondent has violated the Act as alleged in the complaint.

As an initial matter, I note that the General Counsel appears to concede in its brief that Respondent's dress code had become generally more strictly enforced at the Union Square East store. The General Counsel has asserted that this occurred after and in

[33] The corrective action at issue was signed by Quintero and witnessed by ASM Edwin Gomez on February 17, 2006. It contains a statement to the effect that Malchi refused to sign it.

response to employees having made their union support known; however, regardless of the timing of or motive behind such stricter enforcement, this is not alleged as a violation of the Act in the complaint.[34] The only violations so alleged relate to the alleged disparate treatment of Ayala and Malchi, and there is simply insufficient evidence to establish that either of these employees was singled out for harsher treatment due to their union affiliation. Rather, the evidence establishes that after Vetrano began insisting on stricter enforcement of the dress code, employees were being told to tuck in their shirts, remove large jewelry, and cover their tattoos, among other things.

With regard to the discipline issued to Ayala and Malchi, the record establishes that employees are routinely given corrective actions for violations of Respondent's dress code. The record contains numerous examples of employees receiving corrective actions and even being sent home for wearing jewelry prohibited by the dress code policy, failing to tuck in their shirts, and failing to wear the correct color clothing. In addition, Respondent's witnesses testified to a number of instances where employees were disciplined or coached for their failure to comply with the dress code. Thus, the General Counsel has failed to prove that either Ayala or Malchi were treated disparately from other employees. Inasmuch as both Ayala and Malchi clearly refused to comply with management's directives regarding their compliance with the dress code, which has not been alleged or proven to be unlawful in its promulgation or general enforcement, I do not find that the discipline issued to them, admittedly for their refusal to follow the instructions of their superiors, violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

On another occasion, Quintero instructed Malchi to button up his shirt, so that the white undershirt he was wearing under his black button-down shirt would not be visible. This is alleged as another instance of discriminatory enforcement of Respondent's dress code. For the reasons set forth above, I find that Quintero's directive to Malchi did not constitute a violation of Section 8(a)(1) and (3) of the Act, as alleged in the complaint.[35]

[34] Although the General Counsel contends in its brief that the stricter enforcement of the dress code is a violation of Sec. 8(a)(1), the General Counsel has not set forth any theory under which I might find such a violation where the allegation has not been pled in the complaint. In this regard, I note that the General Counsel amended the instant complaint on numerous occasions during the hearing, and at no point put the Respondent on notice that it would argue that the overall enforcement of the dress code at the Union Square East store was violative of the Act. Moreover, the General Counsel failed to develop the record with specific evidence regarding when the dress code began to be more strictly enforced. Upon review of the record I find that, under all the circumstances, the matter was not fully litigated and accordingly, will make no findings with regard thereto.

[35] This incident of alleged disparate enforcement of Respondent's dress code with respect to Malchi is alleged in par. 18(b) of the complaint. During the hearing, I reserved ruling on the General Counsel's motion to amend the complaint because it was not entirely clear to me that Respondent had been placed on adequate notice of what the General Counsel was contending. After reading the posthearing briefs, I find it appropriate to grant the General Counsel's motion to amend this allegation of the complaint; however, for the reasons discussed above, I find it to be without merit.

3. Malchi's alleged violations of Respondent's no-solicitation rule

Certain facts relating to these allegations have been discussed elsewhere in this decision. For ease of reference, I reiterate them here.

Prior to March 7, 2006, Respondent maintained the following policy with regard to the solicitation and distribution of materials:

> Posting or distributing notices or other written materials on Starbucks property at any time, without prior approval from your manager, is strictly prohibited.

The Union had scheduled a benefit party for March 4, 2006. Prior to that date, Malchi distributed fliers publicizing the party to his coworkers and to customers. Quintero spoke with Malchi, advising him that an assistant store manager had seen him giving out papers to customers while working at the bar, and that this was a violation of the Company's no-solicitation policy. Malchi stated that he would not do it again. Within the week, Malchi had a discussion with Vetrano where she told him that he would be written up for distribution of material while working. Malchi said that under the NLRB settlement the old distribution policy was invalid, and Vetrano replied that Malchi was being written up anyway. Malchi admitted that it was "probably not" permissible for him to be distributing literature to customers while working behind the bar.

On March 13, Malchi had a discussion about the Union with borrowed partner[36] Aiesha Mumford while both were working, and he also gave her a union button. Then, on April 3, Malchi worked along side borrowed partner Daniel Schwartz. They had a conversation about working at Starbucks and how even with a college degree, this is the sort of job one had to get, as there were not too many jobs out there. The two discussed the fact that they were not making enough money, and there was also discussion of work conditions and hours, the Union, sports, and meeting outside of work. Malchi asked Schwartz for his telephone number. Malchi testified, without rebuttal, that he did not distribute union authorization cards to either Mumford or Schwartz.

On April 25, Malchi was leaving the store after completing his shift, Quintero stopped him and said that Vetrano had asked him to speak with him about his conversation with Schwartz. Quintero said that that Malchi had solicited Schwartz and he was not allowed to talk about the Union while working.

Subsequently, Malchi came to the store prior to the start of his shift and spoke to Quintero about his plans to work as a borrowed partner in another location to make up for a shifts he had missed. Quintero told Malchi that he was not allowed to cover shifts in other stores because he was on final warning status. Malchi protested that he had never received a final warning. He left the store and then returned for his shift. At the time, Quintero told Malchi that he was on final warning for solicitation and the distribution of materials while working. Malchi

[36] A borrowed partner is an employee who is temporarily assigned to a location other than where he or she typically works.

asked why this was the first time he was hearing about this, and Quintero said that Malchi should call for a meeting with RD Beckman, who would make the decision about issuance of a final warning.

On May 3, Malchi met with RD Beckman in the upper level of the store. Quintero joined them as well. At that time, Beckman handed Malchi a copy of a corrective action form for the February 7 pentagram incident, discussed above. She further said that two prior warnings along with several coaching conversations had led to the issuance of a final warning. Beckman told Malchi that he had violated the dress code, that he was insubordinate, and that he was constantly talking about the Union after he had been told not to, and if he continued to do so, he would be terminated. Malchi disputed the basis for the discipline, and complained that he had never seen the warnings Beckman was referring to. He asked Beckman for a definition of the Company's no-solicitation policy. Beckman stated that she would issue a memo outlining the discipline Malchi had received and which would define the Company's solicitation policy.

Beckman prepared a summary of the meeting which she forwarded to Wilk. In this summary she noted the following:

> [Malchi] did not realize that he was on final written warning and only had one copy of the write up. I also stated that each time Tomer refused to sign and a witness verified. He said he did not agree with the write ups. I said he then had a right to write that on the form but because he chose to either walk away or out then it was his choice.
>
> Tomer and I discussed additional coaching conversations and write ups regarding solicitation policy while working behind the counter. I explained to Tomer that he could not pick up shifts at other stores while on final. Tomer stated that he did not agree with solicitation. We discussed that he cannot discuss on the floor while working IWW or Union. Tomer believes that that is against the law. I also discussed with him that he had clearly been spoken to and coached several times and he continues to break policy. I had also said that if he was on break or off that those conversations are his business, but while working it was inappropriate. He brought up that partners have personal conversations on the floor behind the counter and that what was the difference—I stated that customers come first that it is not appropriate to have personal conversations while customers need to be served and no matter what the topic if another partner is offended by the conversation or feels uncomfortable then it should cease—with any topic. He brought up football as an example, I said the same thing if it makes someone feel uncomfortable and they have said they are not interested etc . . . it should stop.

Beckman further advised Wilk that she had told Malchi that she would provide him with a memo outlining the coaching conversations that had been had with him, that she would speak with Malchi's new store manager and district manager to get Malchi the hours at the Union Square East store that he needed, that she would provide Malchi with another copy of the corrective action that he refused to sign and she would clarify how long Malchi had to wait prior to having the ability to pick up shifts again at another store.

On May 13, Malchi met with Beckman, DM Vetrano, and Tracey Bryant, who was about to become the district manager for the Union Square East store. He was presented with a corrective action form as well as a memorandum whose subject is entitled "final warning." The corrective action form references two occasions: the March 3 occasion where Malchi "was witnessed soliciting/distributing flyers in the store at the bar" and another on April 3 where "Tomer approached a borrowed partner and solicited him."[37]

The memorandum entitled "final warning" makes reference to four incidents: a February 15 corrective action for violation of the dress code on February 7; a March 7 corrective action for violation of the solicitation and distribution policy by distributing printed materials concerning a union party while working at the bar; a March 13 discussion with Vetrano about a complaint received from a borrowed partner (Mumford) regarding Malchi's solicitation of her while they both were working; and April 3 corrective action issued because Malchi solicited a partner to support a union while both employees were working.[38]

The warning further provides:

> This document serves as notification of your final warning. Please note that further infractions of our policy regarding solicitation and distribution or of any other Starbucks policies will result in termination of your employment. As we discussed, while you are on final warning, you are not permitted to work in stores other than your home store. If you demonstrate continuous improvement in the areas listed above, *for six months*, we will reevaluate. In the meantime, we also agreed we would get the hours you needed at this store, please speak with your store manager if you need to change your availability to ensure you receive the hours you need.

Malchi asked why he had never been spoken to about these matters, and Vetrano stated that Quintero had tried to speak with him, and Malchi replied that at that point he was off the clock and running to catch a train. Malchi then wrote a statement of protest to the warning, and signed it.

The General Counsel alleges that the above-described corrective actions and final warnings issued to Malchi are unlawful. The General Counsel contends that the discipline issued to Malchi was based upon a solicitation policy that was both presumptively unlawful and disparately enforced. Moreover, the General Counsel contends that Malchi was prohibited from borrowing shifts to prevent him from organizing in other facilities, and that Respondent's "best practice" is merely a pretext to restrict his movement and contact with employees. The General Counsel points to the fact that there is no written policy restricting partners from borrowing other shifts when on final warning. The General Counsel further points to the fact that Respondent was apparently willing to give Malchi additional

[37] Although this corrective action is dated March 7, it encompasses both incidents as described above.

[38] It appears from the record that this reference was to Malchi's conversation with borrowed partner Schwartz.

hours at his own store during the timeframe in question, and argues that this undermines any legitimate reason proffered by Respondent for enforcing the rule.

Respondent contends that in issuing discipline to Malchi it was neutrally enforcing its dress code and its no-solicitation policy. Respondent further contends that, although partners are allowed to "borrow" shifts at other stores, they are not permitted to do so while on final warning.

Respondent relies upon Wilk's testimony that it is a "best practice" that managers do not allow partners to work shifts in stores other than their own until some agreed-upon timeframe when their performance is brought back to an acceptable level. In addition, Quintero testified that he told Malchi that he could not pick up shifts at other stores while he was on final warning, and that this was "standard." [39] Respondent placed into evidence a corrective action issued to another employee which states, in relevant part: "On 6–25–05 Tenaja covered a shift at 54th and Broadway and did not get approval from management or her district manager. She was told that she could not cover any shifts outside the store based on performance issues . . . ."

The corrective action form dated March 7 references two situations, one involves Malchi's distribution of union-related materials in a work area, on worktime. The General Counsel argues that the basis for this disciplinary action stemmed from Respondent's earlier no-solicitation policy, the one in place prior to the March 2006 settlement agreement. The General Counsel argues that the former policy is unlawful, and that any discipline that flows from it must be unlawful as well. I note however, that the settlement agreement in question contained a nonadmissions clause. Holding the General Counsel to its part of this bargain, I find that they cannot seek a finding here that the policy that formed the basis for Malchi's discipline on this occasion was unlawful. In any event, it is not entirely clear that Malchi was disciplined pursuant to this earlier policy. I note that the settlement agreement, containing the new no-solicitation policy was entered into on March 7, which is the date of the corrective action. Moreover, Malchi acknowledged that it was not appropriate for him to be distributing materials while behind the counter while working.

The General Counsel further contends that Respondent discriminatorily restricted union-related solicitations while allowing others to take place. In support of this contention, the General Counsel presented evidence that Respondent has, at times, allowed various types of materials to be distributed in work areas. For example, in October 2005, employee Christina Stumph distributed invitations to a poetry reading and several employees attended the show, including ASM Doran. In the spring of 2006, a card for a departing employee was passed around for signature. In January 2007, another employee circulated a purchase form for Girl Scout Cookies and employees as well as SM Cynthia Alecia completed the form. ASM Martinez once attempted to sell Malchi a pair of pants and Montalbano testified that he distributed fliers for a rock concert to coworkers at his store, and distributed CDs of his band to customers and coworkers.

It is true that the General Counsel adduced evidence of certain instances where employees engaged in solicitation while working. I do not find, however, that the evidence adduced regarding these apparent solicitations was sufficient to meet the General Counsel's burden of proving that Respondent discriminated against union-related solicitations while consistently tolerating other types of solicitation for nonunion matters during in work areas during worktime.

Notwithstanding the foregoing, I find that the March 7 corrective action was discriminatory because Malchi was also being cited for his discussions of the Union with Schwartz, pursuant to Respondent's discriminatory "no-talking" rule. As there was no evidence adduced that Malchi did anything but speak about the Union, among other topics, to Schwartz, or that these discussions interfered with either employee's performance of their job responsibilities or otherwise disrupted operations at the store, I accordingly conclude that to the extent Respondent has relied upon this incident to support the corrective action, it is unlawful. See, e.g., *Tuscaloosa Quality Foods, Inc*., 318 NLRB 405, 411 (1995); *Hyatt Regency Memphis,* 296 NLRB 259 (1989) (discipline of employees pursuant to discriminatory rules adopted as a result of union campaign is unlawful).

Although Respondent argues that it lawfully issued discipline to Malchi for distribution of written materials while working, the fact remains that Respondent chose to rely further upon an occasion where Malchi was engaged in conduct protected by the Act and was disciplined pursuant to an unlawful rule. Further, there is no evidence that the March 7 corrective action was presented to Malchi contemporaneously or at any time prior to his protected conversation with Schwartz on April 3. Accordingly, I find that Respondent has failed to meet its burden under *Wright Line* to show that it would have issued the March 7 corrective action to Malchi notwithstanding his protected conduct. See *Mid-Mountain Foods, Inc.,* 291 NLRB 693, 699 (1988).

Similarly, I find that the final warning issued to Malchi on May 13 is unlawful in that it relies, in significant part, on Malchi's alleged breaches of Respondent's unlawful no-talking rule. Accordingly, any subsequent disciplinary action taken by Respondent against Malchi based in whole or in part on this warning is similarly violative of the Act, unless Respondent can show that it would have taken the same action against him, absent consideration of the unlawful warning. *Joe's Plastics, Inc.,* 287 NLRB 210, 211–212 (1987); *Mi-Mountain Foods*, supra. By Respondent's own admission, its restriction on Malchi's working shifts at other stores was based upon the fact that he was on final warning. Moreover, Respondent has failed to come forward with neutral, nondiscriminatory reasons for its prohibition on Malchi's working at other Starbucks locations. Accordingly, I find that such restrictions were also discriminatory and in violation of Section 8(a)(1) and (3) of the Act, as alleged.[40]

[39] When asked what the rationale for this "best practice" was, Beckman stated: "Why would we want to send a person with performance issues to another location?"

[40] The General Counsel's motion to amend par. 11 of the complaint is granted. The General Counsel has made it clear that this allegation of

4. The alleged unlawful discharge of Joseph Agins Jr.

a. Background

Respondent hired Agins in May 2004 as a barista, working at its 9th Street store. It is undisputed that Agins was an open and active union supporter. Both the General Counsel and Respondent rely, for varying reasons, on the assumption that Agins was not identified as a union supporter until the public declaration at the 9th Street store on May 28, 2005. As I have noted above, however, Smith identified Agins as a likely union adherent in an April 28 e-mail to Wilk. During the period from May to December 2005, Agins was an open and vocal union adherent and participated in various union sponsored events including leafleting and protesting in support of the Union.[41]

Agins was discharged on December 12, 2005, by Respondent, and there were two incidents preceding his discharge, as will be discussed below.

b. The May 14 incident

On May 14, 2005, Agins was working during a period of time when the store was experiencing a particularly high volume of customers due to a local street fair. At the time, there were three employees on duty: Agins, ASM Tanya James,[42] and another barista, Leonella Talverez.

At some point during the afternoon, a group of customers came in and asked for blended drinks, known as Frappuccinos. Due to the volume of orders, Agins asked ASM James for assistance in serving the customers. James was busy at the time, refilling the self-service bar where customers obtain milk and other items they may wish to put into their drinks. According to Agins, James told him he would have to wait, in a manner which, as he testified, he perceived as disrespectful. As Agins recalls it, he requested assistance again, and was responded to in a similar manner. James eventually came over to assist Agins and he admits to saying that it was about damn time she came on the line. He further acknowledges that he placed the blenders in the sink in a manner which caused a loud noise.

James testified that, after she told Agins he would have to wait until she stopped filling the condiment bar for help on the line, Agins lost his composure, and said, "[T]his is bullshit." At that point James told Agins that he needed to keep his composure in front of customers. As James has asserted, Agins then stopped working and leaned against the counter telling James to "do everything your damn self." James went to assist serving the customers and told Agins to pull his till and leave for the day. Agins pulled his till but stated that he would not leave. Agins went into the back room where, after a telephone discussion with SM Julian Warner, he returned and clocked out.

Sometime thereafter, James provided a written account of the event. On Monday, May 16, DM Smith forwarded this account to Wilk with an apparent recommendation that Agins be discharged for the incident. Later that day, Wilk responded, noting that: "Being there is nothing in his file, I can only assume that this outburst was out of character for Joe. From the comment he made, 'who did the schedule'—is it true that they were understaffed, which perhaps led to his frustration? I think we need to figure all of that out. Assuming it was a 'one off' my recommendation would be a FWW [final written warning] for Joe. Its [sic] certainly not OK to speak to a manager in that manner or anyone for that matter."

According to Respondent, SM Julian Warner then issued a written warning to Agins, which states as follows:

> Joe admitted to using profanity in an undertone to the assistant manager, Tanya James when he asked her for help in preparing drinks and she responded that she was busy doing a 'bus' and that she would help him in a minute. Joe became very agitated and shouted at Tanya in the presence of guests and fellow partners. As stated by Tanya, Joe became insubordinate when she asked him to discontinue this behavior and to punch out and leave the store. Insubordination and the lack of respect and dignity in the workplace are not in accordance with the policies and standards of operation at Starbucks Corporation. Therefore, this corrective action serves as a final warning that the aforementioned behavior, if repeated will result in termination of employment at Starbucks Corporation.

According to Agins, he never received this warning. The warning, placed into evidence by Respondent, is dated May 15, and although it is signed by Warner, it is neither signed by Agins, nor is his refusal to sign documented. Nor is the administration of the warning witnessed by another manager, in apparent contravention to Respondent's usual practice, as documented elsewhere in the record.[43]

In any event, Agins was suspended for a period of several days and then called back into work. The record reflects that subsequently, he apologized to Smith for using "foul language on the floor in front of customers" and also apologized to James for his "attitude" on the floor.

c. The union button incident

On May 18, 2005, a complaint had issued against Respondent alleging, among other things, that Respondent had unlawfully refused to allow employees to wear buttons expressing their support for the Union. By that time, employees at the Union Square East store had been wearing buttons without incident, but Smith had continued to insist that employees at his store, including Montalbano, remove such buttons on pain of

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the complaint applied solely to Respondent's restrictions on Malchi's picking up shifts at other Starbucks locations and, moreover, based upon the testimony adduced at the hearing and the arguments set forth by the General Counsel and Respondent in their respective briefs, I find that the issue has been fully litigated.

[41] Agins participated in the June 2005 demonstrations at the Second Avenue and 17th Street stores. He frequently distributed union literature outside various Starbucks locations, where he was observed by management. He had discussions about his support for the Union with his store manager and he was one of those IWW supporters whose activities were included in Respondent's periodic recaps of union activity.

[42] James was an ASM for approximately 3 years. She commenced working at the 9th Street store in April 2005. She was promoted to store manager in May 2007.

[43] Wilk testified that the usual practice is to ask an employee sign a corrective action. If the employee refuses to do so, then the manager administering the discipline will sign it, document the employee's refusal to sign and have another manager act as a witness. This practice is documented in the record herein on numerous occasions.

being sent home. Montalbano and other employees had faced such a situation on November 20. A group of union supporters decided to support Montalbano in a "Union button" action during Montalbano's shift the following evening. Thus, during the evening of November 21, Agins (who was off duty at the time), Malchi, Ayala, and several other individuals went to the 9th Street facility. James was the manager on duty at the time. The group took a table at the rear of the facility, near the restroom. According to Montalbano, when the group entered, wearing union pins, he approached James and told her that he was going to put on a union pin. James stated that she understood and went into the back room. She subsequently emerged and told Montalbano that she had spoken to Smith who stated that as long as Montalbano was working, and not disrupting anything, he could continue to wear the pin. James stated that she did not remember Montalbano putting on a union pin or contacting Smith by telephone shortly after the union supporters came into the store that evening.

At some point shortly after the group entered the store, Agins was standing near the service bar when a customer, later identified as ASM Ifran Yablon, entered the store to purchase a drink. Yablon is a manager from a Starbucks facility on the Upper West Side who is also a regular customer at the 9th Street store.

By way of background, it should be noted that Yablon was not unknown to Agins. Not only did Agins recognize Yablon as a customer, but the two had some personal history, as well. During the prior summer, the Union was leafleting at a company-sponsored event intended to promote its bottled water product. Agins was there, along with his father, who was wearing an IWW hat. Agins' father pointed Yablon out and reported that he had made some derogatory remarks relating to Agins' father's age and apparent support for the Union. Agins acknowledged that he did not personally hear Yablon make these comments.

It is apparently undisputed that, upon seeing Agins wearing a union button, Yablon engaged Agins in conversation, asking what the union button was for. When Agins responded, Yablon made some comments in support of Starbucks and the two men engaged in a dialogue, which then became heated. There are essentially two segments to the narrative presented by the witnesses herein. While the testimony of the witnesses varies in some detail, the overall picture which emerges of Agins' initial argument with Yablon is not subject to significant dispute. Where the accounts of the General Counsel's and Respondent's witnesses differ concerns whether Agins continued to shout, use profanity and disrupt business after his companions intervened to stop the argument.

Agins testified that after the group entered the store he was talking to Montalbano and Yablon initiated a conversation about the Union. He told Agins that employees did not need a union because they had health benefits, a 401(k) plan, and stock options. He made some reference to the Starbucks mission statement. Yablon stated that the Union only worries about business and taking dues from members and not defending workers. Agins testified that things then "started to happen really fast and get really loud. He was in my face and basically we started having an argument. He got into my face and raised his hands up." Agins testified that he told Yablon that he didn't want to fight him, and that he was there for a union button action. Montalbano told Agins to calm down and Malchi pulled him away and he went to sit down. Sometime later, James approached him and asked him what had happened. According to Agins, he told James that Yablon had "disrespected" his father during the summer and that he had gotten very loud with Agins. Agins told James that he was not there to fight or disrupt business, but for a peaceful union button action. James told him that he had been loud and obnoxious and had disrupted business, and she was going to tell Smith about the incident.

In his testimony, Agins admitted that he became angry during the exchange with Yablon and used profanity, and claimed that Yablon did so as well. During his cross-examination, Agins admitted that Yablon had told him to "get out of my face." Agins further admitted that he told Yablon, "You can go fuck yourself, if you want to fuck me up, go ahead, I'm here." In addition, Agins acknowledged that during the argument, he brought up Yablon's apparent insult of his father the prior summer. As Respondent brought out in cross-examination, Agins' pretrial affidavit does not make reference to any profanity having been used by Yablon.

According to Malchi, the group entered the store, wearing union hats and buttons. They greeted Montalbano, and most members of the group went to sit at a table near the back of the store, about 10 to 15 feet from the counter area. Agins remained at the counter, talking to Montalbano. A short while later, Yablon came in and purchased a drink. According to Malchi, he noticed Agins and Yablon talking, but was too far away to hear what they were saying; however, he did see Yablon point at Agins' union button. At that point the conversation was getting loud, and Malchi could make out that it had something to do with the Union. Malchi called Agins over to the table, and Agins stated that Yablon was disrespecting him and talking against the Union. As Malchi testified, Yablon approached the group at the table, and made some comments to Agins, but Malchi could not recall what he said. At this point, according to Malchi, Agins had become upset and Malchi told him to talk to him and ignore Yablon. Then, ASM James came over and spoke to Yablon. Malchi was speaking to Agins, and he did not hear what she said to him. As Malchi testified, James then escorted Yablon out. The group remained at the store for approximately 10 minutes, and then left. On cross-examination, Malchi acknowledged that Agins had raised his voice to Yablon, but denied hearing any use of profanity.

Ayala testified that after the group entered the store, she went to use the rest room. When she came out, she saw Agins arguing with a man, whom she did not know. The two were getting "pretty loud" and the man was talking aggressively with his hands. Ayala did not remember much of the conversation, but recalled that it had something to do with the Union. As she testified, once they started getting "aggressive" the group pulled Agins over to the side and sat him down. James came over and told the group to leave. Ayala asked Agins who the man was, and he said that he worked for Starbucks and had disrespected his family. On cross-examination, Ayala acknowledged that both men had raised their voices and used profanity.

Montalbano testified that after Yablon purchased his drink, he pointed to the union button Agins was wearing and asked why employees needed a union. Yablon stated that employees did not need a union; that the Company has great benefits and gives benefits to part-time employees. Agins replied that the Union is good for the workers and gives them a voice. According to Montalbano, at this time Agins was standing by a table near the merchandise display. Then, the two started getting into a debate, and moved toward each other until they were about 3–4 feet apart. They were arguing about whether the Union was good or bad and their voices got louder. Both men also started making hand gestures. According to Montalbano, at some point, James came over to Agins and told him that he needed to calm down. Yablon left the store. After Montalbano told the group that he would be allowed to wear his union button while working, they left. Montalbano denied hearing Agins use profanity.

According to James, Agins entered the facility with a group of approximately four others and began eating samples of cake left on the counter. They went to sit down. Agins began speaking with Montalbano. At this time, James was behind the pastry case, making coffee. Yablon entered and purchased a drink. James acknowledged that she heard Yablon address Agins first, saying something about the union pin that Agins was wearing. Then, the two men exchanged words. James initially testified that she did not hear what was said between the two at the time; she later acknowledged that she heard Agins respond to Yablon by stating that the pin was for a union, and that employees were trying to organize a union.

According to James, the tone of the discussion was "fine" initially, but at some point she could hear Agins' voice over the coffee grinder. She heard Agins say: "You gotta stop disrespecting me. Stop fucking disrespecting me. You disrespected me in front of my pops, my dad." James testified that she told Agins to calm down, and the customer walked over to the condiment bar, fixed his coffee, and then left the facility.

In contrast to the testimony of the General Counsel's witnesses who assert that Agins then sat at the table with them until they left some 10 minutes later, James testified that, as Yablon was walking out the door, Agins kept yelling. James asserts that she told him if he did not calm down she would call the police, and Agins said, "No. No. I'm tired of this shit. I'm tired of this shit." James' testimony continued as follows:

> Q. [COUNSEL FOR RESPONDENT]: And where were you standing when this happened? When the customer exited the store where were you?
>
> A. [JAMES]: I was about two feet from the counter. I was about two feet from Joe. So I was pretty much directly in the middle. As Joe was coming—he was still trying to talk to the customer behind me who was already walking out the door. And I was asking him to 'calm down, calm down.' And he kept coming forward, kept coming forward saying 'No, no. no. I'm tired of this. You don't understand.' So, as he's coming forward, I'm taking steps back asking him to calm down. And he wouldn't calm down. And at that time that's when the crowd he was with was trying to pull him back. And so he was saying, 'No, no, no.'
>
> Q. And who was he saying, 'No, no, no' to?
>
> A. Me. To me.
>
> Q. And in what direction was he walking?
>
> A. He was walking toward me and I was walking backwards.
>
> Q. And what was the volume of his voice during this time?
>
> A. It was a volume that was very loud. It was the beginning of the week, and usually people are on their laptops, they're studying and people had already turned around and was looking. He was causing a scene.
>
> Q. And did he use any profanity as he was walking toward you?
>
> A. Yes.
>
> Q. What did he say?
>
> A. "I'm tired of this shit."
>
> Q. And did he say this more than once?
>
> A. Yes he did.
>
> Q. And during this entire exchange—once the customer left, was his voice raised the entire time?
>
> A. Yes. Yes it was.

On cross-examination, James admitted that when she came out from behind the coffee bar, she initially approached Yablon, asking him to "leave it alone." She further admitted that she did not speak with Agins at this time. James did not contact anyone from management about the incident during the evening in question.

At the end of the evening when James was closing the store, Montalbano approached her and apologized about what had happened earlier.

Yablon was not called to testify, and no explanation of why he was unavailable was proffered by Respondent.

d. Respondent's written statements documenting the November 21 incident

The record establishes that store managers are expected to complete an incident report whenever anything out of the ordinary occurs under their supervision. James testified that she prepared an incident report outlining the events of the evening, on a form maintained by Respondent. During James' cross-examination, she was shown an exhibit by counsel for the General Counsel, which she identified as being part of the incident report she prepared. As James admitted, the page she was shown contained five lines of handwritten narrative. James stated that she was "pretty sure" that she had written additional material which was not reflected in the exhibit. Respondent failed to offer testimony regarding why James' initial statement was never offered into evidence or what may have happened to anything further James may have written that evening.

One week later, an e-mail, dated November 28, was sent to Smith purporting to describe the events in question from a first-person perspective (i.e., from James' point of view). The e-mail was not identified as emanating from James, only from the 9th Street store. Smith testified that it had been sent to him either by James or Warner. Significantly, James was not shown this document for identification; nor did she testify that she pre-

pared or sent an e-mail account of the events of the evening. Inasmuch as the narrative purports to be a first-person account by James, who offered no testimony regarding its preparation or existence, I conclude that this document was authored by someone else. I further find that, inasmuch as it purports to recollect events from James' point of view, it is unreliable hearsay.

On December 1, Wilk sent an e-mail to Smith requesting that Smith provide a copy of the corrective action which had been administered to Agins as a result of the May 14 incident, as she did not have a copy at the office.[44]

Then, on December 5, James was called to Wilks' office where she signed a prepared statement describing the events of the evening. In relevant part, this statement provides as follows:

> Joe entered into a conversation with Peter at the register, where they talked for a few minutes. A customer arrived and Peter rung up his order. The customer is an ASM from a Starbucks store on the Upper West Side of Manhattan and is a regular customer at our store.
>
> Joe continued to stand by the register, so the customer asked Joe, 'What's the pin for?' Joe responded that they were trying to start a union and proceeded to describe the reasons why, including his view that the partners were not getting enough hours. The customer responded that 'There are a lot of stores in the city [where you could pick up hours], so that's not an excuse.' The two continued talking, but at this point I could not hear their exact words from my position behind the counter.
>
> Soon, however, Joe's voice started rising and he became agitated and was becoming more aggressive toward the customer. I walked out from behind the counter and asked the customer to 'leave it alone,' at which point he chuckled and backed off. Joe was pacing nearby and said to the customer is a loud voice, 'You don't think I remember you disrespecting me in front of my father. I remember that shit.'
>
> I approached Joe and told him 'Joe, you need to calm down. You're disturbing the customers.' Joe responded, 'Fuck that!' At that point, it was clear that Joe was extremely agitated. I felt physically threatened, since I had seen him lose his temper in the past and was concerned that he might become violent. (I am only 5 foot 2 inches tall, and 100 pounds, and Joe is considerably heavier and stronger than I am.) I repeated, 'you have to calm down or I'm going to have to call the police Look at all the customers who are disturbed.' Joe's friends stepped in to try to pull him back physically, but he was resisted them.
>
> Joe's friends escorted him to their table in the back, but Joe continued with his loud and disruptive behavior, calling out in a loud voice, 'This shit don't make sense. Fuck this.' Because he was continuing to cause a disruption, I walked over and told Joe, 'You're still too loud; you need to calm down.' Joe responded that, 'You know, he made me mad,' and I answered, 'You still need to calm down; it's really, really loud and all the customers are looking.'
>
> Joe and his friends remained in the store for approximately 10 more minutes and then left.[45]

James testified that Wilk had taken her handwritten report, which was a "scribble scrabble" and made only stylistic changes, but did not change the substance of the report. On cross-examination, James admitted that, while she knew that Yablon was an employee, because he had a partner discount card, she did not know he was an ASM at another Starbucks location.

Smith testified that he received a telephone call about the incident from either James or Warner and then contacted Wilk.[46] He then sat down with Agins, telling him that "we have been here before and are at the same place again." According to Smith, he told Agins that there would be a meeting at a later date to discuss what would happen to him. Smith testified that he had wanted to terminate Agins, but was awaiting advice from Wilk as to how to proceed. In his testimony about the event which precipitated Agins' discharge, Smith stated: "This is the chair incident, correct? Where he threw the chair around or something?" Under cross-examination, Smith acknowledged that he could not independently recall the details of the incident which led to Agins' termination, and kept requesting to be shown documentation.

e. Agins is discharged

On December 12, Agins called into work because he was running late. When he arrived, Warner instructed him not to clock in, and made reference to the incident with Yablon. Warner told Agins that he wanted him to sit down and speak with a representative from human resources (identified as Partner Resources Manager Nicole Mosliak). Agins wanted Montalbano to act as his witness, but his request was denied. Montalbano told Warner that it was illegal to fire an employee unless he was on the clock, and Warner allowed Agins to clock in. Agins went to the rear of the café, where Mosliak was sitting and asked why he was not being allowed to work, and was told it was because he had disrupted business. Agins asked if it was because he was involved with the Union and Mosliak replied that there was no Starbucks Workers Union.

Mosliak gave Agins a paper and pencil and asked him to write a statement about the Yablon incident, and although he took some notes, he did not provide a statement to Respondent.

[44] I note that Smith testified that Wilk had requested, and was provided with, copies of all discipline. I further note, as outlined above, that Wilk had previously instructed managers that she be kept advised of discipline meted out to union supporters. Thus, it appears that, fully six months after the event in question, Wilk had still not been provided with a copy of the final written warning allegedly delivered to Agins based upon the events of May 14. I find that this fact, in conjunction with the other circumstances described herein, corroborates Agins' testimony that the warning was never delivered to him.

[45] At the time this exhibit was proffered, Respondent stated that the document was "not being offered for the truth of the statement" but rather as a record of an investigation as conducted by Wilk.

[46] Smith was not specific about when he received this information. As noted above, James testified that she did not contact anyone from Starbucks' management on the evening in question.

Agins was told that he was discharged. He claims that, at the time, nothing was said about his having been placed on final warning.

Neither Warner, who no longer works for the Company, nor Mosliak, who does, testified herein. According to Smith and Wilk, Warner could not be reached.

Wilk testified that she spoke with Yablon and James about the November 21 incident. She then consulted with Mosliak, company attorneys, and Smith. She asserted, however, that she merely made a recommendation as to termination and the final decision was made by SM Warner. However, Smith (who was, after all, Warner's superior) testified he does not necessarily terminate partners, but contacts partner resources to make sure that "we are doing the right thing with every partner." According to Smith, partner resources seeks his opinion and then there is coaching on what has been done in the past with these kinds of situations. On cross-examination, Smith confirmed that he had a "small role" in the determination that Agins would be discharged, and that he was not present when the decision was made. According to Smith, Agins' discharge was implemented because "Tracy felt we had enough to support that termination, just as we did the previous termination of Alex Diaz."[47]

After Agins was discharged, Warner filled out a partner action notice (PAN) memorandum to document his termination. Warner indicated that Agins would be ineligible for rehire for the following reasons: "Partner was insubordinate and threatened the store manager. Partner strongly support [sic] the IWW union."

f. Analysis and conclusions

The General Counsel contends that Agins was putatively fired for conduct which was part of the res gestae of concerted, protected activity, i.e., the union button action, and that under *Atlantic Steel Co.,* 245 NLRB 814 (1979), his conduct was not sufficiently egregious to lose the protection of the Act. Alternatively, the General Counsel argues that Respondent seized upon Agins' argument with Yablon as pretext and, accordingly, if analyzed under *Wright Line*, the evidence establishes a prima facie case that Agins' union activities were a substantial or motivating factor in his discharge and Respondent has failed to meet its burden of showing that it would have discharged Agins notwithstanding his protected conduct.

Respondent argues that Agins' conduct was not protected by the Act and that Agins was discharged due to repeated acts of abusive, insubordinate and disrespectful behavior toward his supervisors, as well as profane outbursts and inappropriate behavior directed toward customers. Respondent further argues that even if it were to be found that Agins had engaged in conduct protected by the Act, it has met its it has met its burden under *Wright Line* of demonstrating that it would have discharged Agins notwithstanding his union activities.

As the Board has held, "when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Noble Metal Processing, Inc.,* 346 NLRB 795 (2006), quoting *Stanford Hotel,* 344 NLRB 558 (2005). The Board has acknowledged that an employee's right to engage in concerted activity permits some leeway for impulsive behavior, which the Board balances against the employer's right to maintain order and respect in the workplace. *Verizon Wireless,* 349 NLRB 640, 642 (2007) (citing *Piper Realty Co.,* 313 NLRB 1289, 1290 (1994)). Where an employee directs profane and disrespectful comments toward a supervisor while engaging in otherwise protected activity, the Board has found such conduct to lose the protections of the Act. See, e.g., *Daimler Chrysler Corp.,* 344 NLRB 312, 317 (2005). However, there are also circumstances where the Board has found that an employee's use of profane or derogatory language does not strip that employee of the protections of the Act. See *Felix Industries,* 331 NLRB 144, 146 (2000), enf. denied and remanded 251 F.3d 1051 (D.C. Cir. 2001), on remand 339 NLRB 195 (2005).

Respondent argues in the first instance that Agins' conduct was not protected. Respondent contends that the "delegation" referred to by witnesses for the General Counsel "merely hung out at the store without purchasing anything or attempting to speak with any manager regarding their terms and conditions of employment." However, as the General Counsel points out, on the evening in question, Agins and his fellow union supporters went to the 9th Street store as part of a planned action to support Montalbano in his federally-protected right to wear a union button at work. Three days earlier, the NLRB Regional Office had issued a complaint alleging that Respondent had unlawfully prohibited employees from wearing union insignia at work, and Montalbano, among others, had been among those previously sent home for doing so. In fact, on the prior day, Smith had told employees at the 9th Street store that if they did not remove their pins they would be sent home. These individuals all wore union buttons and other insignia and, when they arrived, Montalbano put on a union pin as well. In agreement with the General Counsel I find that generally this was concerted, protected conduct. This conclusion does not, however, answer the question of whether, during the course of events that ensued, Agins engaged in conduct otherwise unprotected by the Act.

Respondent notes that the exchange between Agins and Yablon involved a discussion of Yablon's disrespectful comments toward Agins' father during the Company's bottled water promotion, and argues that such comments were of a personal nature, unrelated to concerted action. It is also the case, however, that Yablon initiated the discussion with Agins by commenting on the union pin and making comments as to why employees at Starbucks did not need a Union. Based upon the well-documented evidence that Respondent closely tracked union activity in its stores, and communicated information about this activity to its managers, I find that Yablon would have known what the button signified and therefore conclude that his query was meant to be confrontational. It is also the case that the comments allegedly made by Yablon toward Agins' father arose from protected conduct Agins had been engaged in during the water promotion and related specifically to a showing of support for the IWW. Thus, even assuming that a portion of Agins' argument with Yablon dealt with what he

[47] Diaz was a union supporter who had been discharged, who was referenced in Wilk's May 16 e-mail to Smith recommending that Agins receive a final written warning for his conduct on May 14.

perceived as a personal insult, this discussion took place within an overall context of protected activity. I do not find, therefore, that the fact that Agins brought up a personal issue at this time made his interaction with Yablon unprotected in its entirety.[48]

(1) Credibility resolutions

Then, there is the nature of Agins' alleged misconduct itself. In order to evaluate this, I must assess the credibility of the various witnesses who testified regarding the events in question, and the reliability of other evidence proffered by the Respondent. I find that certain of the General Counsel's witnesses, in particular Malchi and Montalbano, were shading their testimony in an apparent attempt to protect Agins, particularly insofar as they denied hearing him use any profanity, a fact which Agins and Ayala admitted. Moreover, the accounts of all of the General Counsel's witnesses are not fully consistent with respect to certain details. I find, however, that these inconsistencies would be characteristic of witnesses testifying truthfully, from their best recollection, rather than from some previously agreed-upon version of events. I further note that, to a large extent, the general parameters of the account offered by the General Counsel's witnesses are corroborated by James' testimony, insofar as she has described Agins' initial interaction with Yablon.

Thus, based upon the credible testimony, and the inherent probabilities of the situation, I find that the incident in question was precipitated by Yablon who asked what the button Agins was wearing was for; that the two men began a discussion of the relative merits of the Union and the benefits Starbucks offered to its employees; that the discussion escalated into an argument; that Agins made reference to Yablon's perceived insult of his father during the prior summer and that both men made hand gestures and used profanity.[49] I further find that Agins' companions intervened to stop the argument and he withdrew to a table near the rear of the facility where the group had been situated. I additionally find that after James approached Yablon to and told him to "leave it alone," he finished preparing his coffee and left the facility. I find that James subsequently came over to admonish Agins, but he remained seated with the group, and did not use profanity or make threatening gestures toward James. I further find that Agins and the others remained in the store for a period of some 10 minutes, without further incident, and then left. It is undisputed that James contacted neither Starbucks management, nor the police regarding Agins' purported misconduct during the course of the evening.[50]

For various reasons, which are discussed below, I do not credit significant portions of Respondent's account of events, which I find to be overblown and to a large extent, inherently improbable. In particular, I do not credit James' testimony that Agins resisted the efforts of his companions to intercede in the argument, and continued to follow Yablon toward the door. I do not credit her testimony that as Agins proceeded forward, James interceded to calm him down but that he continued to press toward the door and shout profane comments. As noted above, I give no weight to the November 28 e-mail which purports to describe Agins' misconduct, and, for the reasons discussed below, I find the account James signed on December 5 was not an accurate reflection of her initial statement about the events of the evening and, moreover, that it contradicts her sworn testimony herein in certain material respects.

(a) Alleged history of composure issues

Both James and Smith testified that Agins had a history of composure issues predating the May 14 incident. As Respondent argues in its brief, in a composite summary of witness testimony (quoted below with transcript citations omitted), these witnesses testified that:

> Throughout his tenure as a barista for Starbucks, Agins demonstrated an inability to maintain his composure while working. In particular, Agins would 'get very agitated when on the floor or if confronted by a customer.' He lost focus very easily and would become 'emotional' and 'erratic in his behavior.' Once after a miscommunication with a customer about a drink order, Agins became 'agitated' and started 'pounding' his hand on the counter and raising his voice toward the customer. Agins' voice became so loud that others in the store turned their heads to see what was happening. On more than one occasion, Agins' managers had conversations about his need to maintain his composure while working.

I noted that during his testimony, Agins appeared to be highly anxious and predisposed to emotional responses. Yet, the fact remains that Agins, during his tenure with Respondent, would have received at least two, and possibly three perform-

[48] Compare *Scooba Mfg. Co.*, 258 NLRB 147, 149 (1981), enf. denied 694 F.2d 82 (5th Cir. 1982) (per curiam), cert. denied 466 U.S. 926 (1984). In *Scooba Mfg.*, an employee had a "vigorous" argument with her supervisor that was prompted by the employer's decision to fire her son. The argument escalated and then turned to the own employee's work performance and absenteeism. Before leaving the supervisor's office, the employee angrily proclaimed: "It would be nice if it [sic] was a union here. A whole lot of things going on wouldn't be going on." The Board found that the employee's discharge as a result of this heated dispute violated Sec. 8(a)(1) of the Act. The Fifth Circuit denied enforcement of the order, concluding that the employee's conduct was not concerted because the employee was not acting on behalf of her fellow employees and because she had never discussed unionization with her coworkers. The court concluded that her remark was "the product of a purely personal dispute." 684 F.2d at 84. As an initial matter, I note that, in the underlying case, the Board found that the employee had engaged in protected conduct, notwithstanding the fact that her comment was an outgrowth of a personal dispute. Moreover, the facts surrounding the Agins incident are more compelling than those in *Scooba Mfg*. In that case, there was neither a history of collective action nor an indication that collective action was contemplated by employees. Here, by contrast, any personal dispute was preceded by and arose within the confines of protected conduct.

[49] As noted above, Agins' pretrial affidavit does not mention that Yablon used profanity on this occasion. While this is a significant omission to be sure, I do not find it sufficient to discredit his testimony on this issue. See *Gold Circle Department Stores,* 207 NLRB 1005, 1010 fn. 5 (1973). In this regard, I note that Agins' testimony was corroborated by Ayala, and was not rebutted by James.

[50] As noted above, I credit Montalbano's testimony that James had previously telephoned Smith about whether Montalbano could continue to work while wearing a union button.

ance evaluations.[51] None of these were entered into evidence. Based upon other similar documents which are in the record, I find that such difficulties as Respondent has described would have been addressed and documented in such evaluations, should they have caused difficulties with Agins' work performance. In particular, employees are evaluated on whether they act with a "customer comes first" attitude and whether they "maintain[ ] a calm exterior presence during periods of high volume or unusual events . . . ." In other areas of the performance evaluation, employees are rated in the following area: "Composure—Remains calm, maintains perspective and responds in a professional manner when faced with tough situations." There is no evidence that Agins received unfavorable ratings in any of these areas. Nor was there any prior documentation of inappropriate behavior in the form of warnings or coaching conversations with supervisory personnel. In this regard, I note that as of May 2005, Wilk noted in her e-mail to Smith that there was no history of such problems in Agins' personnel file, and Smith did not reply to the contrary. I conclude, therefore, that Respondent's posthoc characterization of Agins' interpersonal difficulties as reflected in his work performance is exaggerated, at best, and calls into question the veracity of Respondent's assertions relating to Agins' alleged misconduct.

(b) The written documentation relied upon by Respondent

Moreover, there is the issue of the written documentation introduced into evidence by Respondent which purports to describe Agins' alleged misconduct on November 21. As noted above, James' initial incident report was never placed into evidence by Respondent, and there was no testimony as to why it could not be produced. Then, there is the puzzling issue of the November 28 e-mail, written from James' first-person perspective by an unknown author. Although I give the contents of this document no weight as regards its description of Agins' misconduct, I find that its creation and maintenance by the Respondent raises questions about who authored it and what its ostensible purpose might have been.

Next, there is the statement prepared by Respondent and signed on December 5 by James. James testified that this was simply a typewritten version of her initial written statement with stylistic changes. However, it is apparent that the statement contains narrative which did not emanate from James. Of particular note is the fact that Yablon is identified as being an ASM from a store on the Upper West Side, a fact which James conceded she did not know at the time. Further, there is other narrative detail, such as a comparative description of Agins' height and weight as compared to James' which I do not believe would have been included in any original account of events. Moreover, the December 5 statement fails to corroborate James' testimony regarding Agins' conduct as he attempted to follow Yablon to the door, testimony which Respondent cites extensively in its brief and relies heavily upon.[52] I find that, had this happened, it would have been a memorable event which would likely have been included in any report James provided to her superiors. In this regard, I find it doubtful that the diminutive James would have positioned herself in front of the substantially larger and heavier Agins to intercede, as she testified.

Thus, I do not credit James' testimony that the description of events, as described in her December 5 signed statement, corresponds in all material respects to her initial written statement. In such an instance there would be no obvious reason for her to be summoned to Wilk's office, some 2 weeks later, to sign the statement offered into evidence by Respondent. I note that while counsel for Respondent stated on the record that James' original incident report did not exist, counsel for the General Counsel had James identify a one-page document which she acknowledged was, at least in part, the incident report she wrote that night. Respondent has presented no testimony nor any explanation for why James was asked to sign a prepared statement, or why her original report could not be produced. Accordingly, I draw an adverse inference from Respondent's failure to produce James' initial incident report or to explain its absence through probative evidence.

(c) Surrounding facts and circumstances

There are several other reasons why I fail to credit Respondent's account of Agins' purported misconduct and find it to be overstated.

As the General Counsel's witnesses testified, and Respondent has admitted, after Yablon left, the group continued to sit undisturbed for a period of 10 minutes. I find it inherently improbable that, had Agins continued to be disruptive, insubordinate and profane, as has been described, his fellow IWW supporters would have remained in the facility for this period. It is entirely more probable that under such circumstances, they would have sought to leave the premises immediately.

Then, there is the undisputed fact that James did not contact anyone from Starbucks about the incident that evening; nor did she explain why she failed to do so. I further note that the record establishes that Starbucks was not reluctant to summon the police to any union-related event deemed to be disruptive of operations. Here, the police were not called. As James was the only manager on duty at the time, I find it highly unlikely that she would have failed to contact either other managerial personnel or the police had Agins been as disruptive or she felt as threatened as has been asserted.

Further, I note that Yablon was not called to testify, nor was his unavailability explained in any way. Inasmuch as he was, at the pertinent time, a member of Respondent's managerial personnel, and there in no evidence that he is no longer affiliated with Starbucks, I can only assume that his testimony would have been favorably disposed toward the Respondent. As it was Yablon who was directly involved in the altercation with Agins, I draw an adverse inference from Respondent's failure to call him to testify or explain his absence. Thus, I conclude that if he had testified, his testimony would have been adverse to Respondent. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). I further note that there is no evidence that

[51] As is discussed below, employees are evaluated every 6 months.

[52] In its brief, Respondent not only reproduces James' testimony but further asserts that, "Agins also came cursing and yelling toward James, who was standing in the middle of the two men. James had to keep backing away from Agins." (Transcript citations omitted.)

Yablon was admonished or disciplined in any way for his participation in this exchange.

For all the foregoing reasons, I find that Respondent has failed to come forward with sufficient probative or reliable evidence to support its contentions regarding the extent and nature of Agins' purported misconduct on November 21.

(2) Application of the *Atlantic Steel* criteria

Respondent contends that Agins was discharged because of his conduct at the 9th Street store on November 21. As noted above, I have found that Agins was engaged in protected conduct on that occasion. Thus, the relevant inquiry is whether Agins engaged in misconduct which would have caused him to lose the protections of the Act. See *Felix Industries,* supra.

Longstanding Board precedent establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity," subject to the employer's right to maintain order and respect." *Piper Realty Co.,* 313 NLRB 1289, 1290 (1994). To assess whether an employee's "admittedly impulsive and unwise conduct is so severe that it outweighs his or her Section 7 rights,"[53] the Board applies the balancing test set forth in *Atlantic Steel,* supra. Four factors are analyzed to determine whether conduct has lost the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices.

With regard to the first factor, the place of the discussion, I note that the argument at issue took place in Respondent's retail facility, and therefore carried with it a likelihood that it could have resulted in a disruption in business as both employees and customers may have overheard the exchange. I note that Agins was not on duty at the time, and his comments were not addressed to his superiors. I further note that this is a facility into which the public is openly and regularly invited, and it is more than likely that this was not the first, nor the last, heated discussion or importune use of profanity to take place there. I nevertheless conclude that the fact that Agins became involved in an altercation with a customer in Respondent's retail facility weighs against protection.

As to the second factor, the subject matter of the discussion, as discussed above, Agins was involved in protected conduct at the time (i.e., the union button action). This is organizational activity which implicates core Section 7 rights. The discussion between Agins and Yablon was then initiated by Yablon's comments regarding the button and his objections to the Union generally. As noted above, the evidence shows that some part of the exchange between Agins and Yablon involved a personal matter. Nevertheless, the fact remains that this aspect of the disagreement took place in the overall context of a demonstration in support of employees' Section 7 rights, and was initiated by Yablon's apparent reaction to this concerted, protected conduct. I also note that the earlier insult also stemmed from protected conduct. On whole, I do not find the fact that some personal comments were made is sufficient to counterbalance the otherwise protected subject matter of the dispute. Thus, I find I find that this factor weighs in favor of protection.

Regarding the nature of the outburst, this factor is largely controlled by my credibility resolutions, as discussed above. The credited testimony establishes that Agins engaged in disruptive conduct which included some use of profanity. However, I do not find that his outburst was as extreme or prolonged as has been characterized by Respondent. In those cases where the Board has found that an employee's conduct has lost the protections of the Act, the evidence generally establishes a repeated, sustained course of action, including vulgar language, typically accompanied by threats, physically intimidating conduct or otherwise inappropriate references, usually directed toward a superior. See *Tampa Tribune,* supra at 1326 fn. 17, and cases cited therein.

Aluminum Co. of America, 338 NLRB 20 (2003), relied upon by Respondent, is distinguishable. There, the Board, reversing the administrative law judge, found that the employee's misconduct was sufficient to cause him to lose the protections of the Act. In that instance, however, the employee's actions involved certain factors not present in the instant case. In particular, the Board found that the employee used sustained profanity which far exceeded that which was common and tolerated in the workplace. Moreover, the Board found that the employee's repeated, sustained and ad hominem attacks could not be excused as an emotional outburst provoked by the respondent's reaction to his protected conduct. Here, by contrast, the evidence shows that Agins was goaded, at least initially,[54] and that his outburst was relatively brief. Moreover, there is record evidence that other employees of Respondent have used profanity, racial or ethnic slurs or other inappropriate language in a variety of circumstances and that, at times, they have been dealt with less harshly.[55] Thus, while I do not condone Agins' con-

[53] *Tampa Tribune*, 351 NLRB 1324, 1326 (2007).

[54] In this regard, I note that James admitted that she initially told Yablon to "leave it alone" and did not speak to Agins at this time.

[55] Respondent offered into evidence records demonstrating numerous instances where employees were disciplined or terminated for engaging in profane outbursts or for otherwise engaging in threatening conduct. A review of these files, however, establishes that Respondent's approach to such instances varies, as would be understandable given the number of facilities, employees, and managers involved. Nevertheless, there is some evidence that, in certain situations, egregious conduct has been tolerated with lesser discipline. By way of example, in October 2005, two employees engaged in an altercation which included (1) a racially-charged slur and (2) a physical fight which included arm-grabbing; ice-throwing, a headlock, and one employee trying to hit another with a bottle of vanilla. As a result of this, one employee (Patrick N.) was issued a final corrective action. He was later terminated for a subsequent infraction. In addition, the exhibits introduced into evidence by Respondent show that frequently employees were terminated only after repeated incidents of inappropriate behavior, and after receiving final warnings. For example, in October 2004, employee Valeria S. was discharged for serious misconduct including threatening and fighting with a coworker. Prior to this, the employee had received several coaching conversations as well as two prior written warnings, one for a customer service complaint and one for a prior altercation with a coworker. In February 2006, employee LaBlessing S. received a "Summary of Current Performance/Corrective Action" which outlined numerous deficiencies in performance including: (1) time and attendance infractions; (2) cash-handling infractions;

duct on the occasion in question, I find that this factor, on whole, militates toward retaining the protections of the Act.

As to the fourth factor, whether the outburst was provoked by unfair labor practices, I note that the union button action took place just days after a complaint had issued containing allegations of unlawful conduct pertaining to Respondent's refusal to allow employees to wear union insignia. The prior day, Montalbano had been directed to remove his union button or face suspension for the remainder of his shift. The complaint allegations were eventually settled with a nonadmission clause, however, and no specific finding of unfair labor practices can be found. Moreover, Yablon's comments to Agins, while provocative in the colloquial sense, have not been alleged to be unlawful.

In support of its contention that this factor should be weighed in favor of protection, the General Counsel relies on several cases where supervisory conduct, not alleged to be unlawful, was nonetheless held to be a provocation which weighed in favor of protection under *Atlantic Steel*. For example, in *Network Dynamics Cabling,* 351 NLRB 1423, 1429 (2007), the Board held that an employee's outburst, which occurred in the context of protected conduct, was provoked by certain comments made by a supervisor. Although these comments were not alleged as an unfair labor practice, the Board found that the element of provocation existed because the supervisor's comments clearly sought to interfere with the employee's protected right to assist in organizational activity. See also *Overnite Transportation Co.,* 343 NLRB 1431, 1437–1438 (2004), where the Board found that provocation by a supervisor in the form of an outright refusal to discuss the circumstances of employee discharges with a shop steward, although not alleged as an unfair labor practice, was held to weigh in favor of protection. However, in *Tampa Tribune,* supra, the Board, citing *Verizon Wireless,* 349 NLRB 640 (2007), found that the fact that the intemperate statements in question were provoked by lawful communications in the form of letters issued by a supervisor was a factor which weighed slightly against retaining the Act's protection.[56]

Here, I conclude that the absence of a finding of legally proscribed conduct does not weigh against continued protection. The employees' protected conduct was initiated to protest employer rules that were, at the time, subject to outstanding allegations of unlawful unfair labor practices. Thus, at the time, employees had a reasonable basis to believe that unfair labor practices had occurred regarding the prohibition on the wearing of union buttons. And, it is undisputed that Yablon's initial comments addressed themselves to that issue. Further, unlike the situations presented in *Tampa Tribune* and *Verizon Wireless,* Yablon was addressing Agins directly, and not through written communications. Moreover, even if I were to conclude that the absence of a proven unfair labor practice limits a finding of "provocation," I find that the overall context of the discussion creates mitigating factors which would lead me to conclude that this factor weighs only slightly against continued protection under the Act.

In sum, I find that while the first factor weighs against continued protection under the Act, this is counterbalanced by both the subject matter of the discussion, which implicates core Section 7 rights as well as nature of the outburst which, while certainly inappropriate, was neither sustained, threatening, nor directed at any immediate superior. I have similarly found that the fourth factor supports continued protection under the Act. However, even if I were to find that the fourth factor weighed slightly against protection, this would not alter my ultimate conclusion. Thus, I find that Agins' conduct during his concerted protest of Respondent's prohibition against wearing of union insignia, while unwise and intemperate, did not cross the line so as to lose the protection of the Act. Accordingly, I find that by discharging him, admittedly for his conduct at this time, Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged.

(3) The *Wright Line* analysis

In its brief, counsel for the General Counsel additionally argues that Respondent seized on the November 21 incident as pretext for Agins' discharge and thereby contends that the real reason for his discharge was his prior and continuing union activity. The General Counsel therefore urges, in the alternative, that an analysis be conducted under *Wright Line*. Respondent, too, analyzes its decision to terminate Agins under *Wright Line*. As both the General Counsel and the Respondent have placed Respondent's motive for Agins' termination at issue, an analysis under *Wright Line,* supra, is appropriate here. See *Waste Management of Arizona,* 345 NLRB 1139, 1140 (2005).

Applying the *Wright Line* standards to the circumstances surrounding Agins' discharge, I find that the General Counsel has met its initial burden of establishing the elements of a prima facie case. It is clear that Agins was an open and active union member, and that his support for the IWW was known to Starbucks management. I note that Respondent's avowed contention that Respondent was unaware of Agins' union support until some time after the May 14 incident is contradicted by the record evidence. Agins was pinpointed as a likely union supporter almost 1 month prior to that date, as described above.

Respondent's motive is further called into question by varying, and at times contradictory testimony regarding the responsibility for the decision to discharge Agins. The record fails to support Respondent's assertions that the decision to discharge

(3) writing profanity on the communication board in the back room; (4) displaying an indifferent and rude attitude toward a customer which included inappropriate language; (5) responding to coaching about an inappropriate conversation while working by mumbling disrespectful comments about the district manager and losing composure; and (6) making inappropriate comments about Hurricane Katrina and other denigrating ethic comments to coworkers. This shift supervisor was subsequently terminated for being "unable to lead by example following our six guiding principles. Partner did not embrace diversity by using racial slurs. Could not keep composure or coach others in the core competencies." In addition, in its brief, counsel for the General Counsel also points to several instances where personnel records show that Respondent has meted out lesser discipline for similar offenses even when repeated by employees who have other discipline in their files.

[56] Similarly, in *Verizon Wireless*, supra, the Board found that the provocation factor weighed against continued protection where the employee's outburst was provoked by an employer's lawful e-mail criticizing the union.

Agins was made by his store manager, as would be typical in situations where the issue of an employee's union support was not at issue. To the contrary, Smith testified the decision was made when Wilk "felt we had enough." The minor role Smith played in this decision is highlighted by the fact that he had virtually no independent recollection of any of the pertinent events. Further, the PAN separation notice reflecting Agins' discharge specifically refers to his support for the IWW as one reason why Agins would not be eligible for rehire. In this regard, I give no weight to Respondent's attempt to adduce hearsay testimony through Smith regarding what Warner may have meant by such comments.[57]

Moreover, the inference that antiunion animus was motivating factor in the Respondent's decision to discharge Agins can be fairly drawn due to the Respondent's commission of other unfair labor practices, as have been found herein. Thus, the General Counsel has established a prima facie case under *Wright Line* that Agins' union activities were a substantial or motivating factor in his discharge.

Respondent therefore has the burden of showing that it would have discharged Agins notwithstanding his protected conduct. In this regard, Respondent argues in the first instance that, "Agins was counseled by his managers regarding his composure and emotional outbursts from early on in his employment." As has been discussed above, there is no probative evidence to establish that to be the case. To the contrary, as of mid-May Wilk noted that there was no indication of composure issues in Agins' personnel file. Respondent also claims that "the undisputed record evidence demonstrates that Starbucks had no knowledge of Agins' support for the Union as of mid-May when his managers disciplined him . . . ." As discussed above, I have concluded that the evidence shows to the contrary. Moreover, I fail to credit the testimony of Respondent's witnesses that Agins received a final written warning for the May 14 incident. The warning is neither signed by Agins nor witnessed by any other manager. It is dated 1 day prior to Wilk's instruction to Smith that it be issued. Moreover, as of the following December, Wilk had not received a copy of it; notwithstanding Smith's testimony that Wilk saw all corrective actions that were issued from the 9th Street store. In any event, regardless of the date the warning was actually written, I credit Agins' testimony that he never received it.

Further, as discussed above, I have found that Respondent has exaggerated and mischaracterized the scope and nature of Agins' misconduct on November 21. The proffer of a false reason for the discharge supports an inference that the real reason is one that an employer seeks to conceal. *Key Food,* 336 NLRB 111, 114 (2001), and cases cited therein. In addition, there is at least some suggestion based upon the personnel files introduced into evidence by both parties, that on various occasions Respondent has dealt with conduct more egregious than Agins' with lesser discipline.

Moreover, inasmuch as Respondent has admitted that Agins' conduct on November 21 was a substantial factor in his discharge, and I have found that such conduct retained the protections of the Act, it is a foregone conclusion that Respondent cannot carry its burden of proving that the discharge was for neutral nondiscriminatory reasons. Further, even if it were to be found that Agins had not been engaged in protected conduct during the evening of November 21, as I have found the Respondent's defense to be, in many material respects, false, and there is some evidence that Agins was treated in a disparate fashion from other employees, I find an unlawful motive to be the real reason for the discharge. Accordingly, under the *Wright Line* analysis urged by both the General Counsel and the Respondent, I find that Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The alleged unlawful discharge of Isis Saenz

a. Background

Saenz was hired as a barista at the East 57th Street store during the summer of 2005. It is undisputed that she was an open union supporter, one of the initiators of the public announcement of union support at the facility at which she worked. As of June 2006, Saenz reported to SM Patrice Britton and Veronica Park was the district manager assigned to the store.

b. The October 26 book signing event

On the evening of October 26, 2006, Respondent hosted a book signing event at its store located at 29th Street and Park Avenue. Starbucks CEO Howard Schultz had been scheduled to attend,[58] and the union supporters decided to stage a demonstration. Approximately 15 members and supporters of the Union congregated outside the store that evening. Among others, this group included Saenz, Gross, Fostrum, Bender, and Montalbano. Saenz was not on duty at the time.

The union members and supporters were chanting, singing and were carrying signs, some mounted on sticks.[59] They also were distributing leaflets to passersby. One such leaflet bore a picture of Schultz and the heading, "Most Wanted." Both Fostrum and Saenz took video recordings of the demonstration that evening. Fostrum's video was entered into evidence, and he was questioned extensively about it by counsel for both the General Counsel and Respondent.

At one point, Fostrum entered the store and attempted to videotape inside, but McDermet, who was present at the time, prevented him from doing so and instructed him to leave. At another point, several protestors entered the store and unfurled a large banner, but they were evicted in short order. Another protestor attempted to distribute union literature inside the store. Saenz testified that, at one point, she briefly entered the store, but then left. At one point the camera zoomed in on McDermet, who was inside the store at the time. Saenz is over-

[57] According to Wilk, the notation at issue was brought to her attention by company legal counsel, and she called Smith who, in turn, stated that he had not seen it and would question Warner about it. Wilk then testified that, up to that point, the issue of Agins' affiliation with the IWW had never been brought up in the discussions surrounding his termination. I find such testimony to be unworthy of belief.

[58] It appears that Schultz never did attend the book signing.

[59] Among the chants were: "What's disgusting? Union Busting" and "What's outrageous? Starbucks wages." Some of the signs read, "We won't accept poverty paychecks" and "Stop Union Busting."

heard making a comment to the effect of, "Hello Jim, we have a surprise for you." She also can be heard yelling, "Hey Barbie Doll Baristas" at employees who were exiting the store. McDermet testified that, while in the store, he heard the chanting, but could not make out any specific statements made by Saenz during that time.

IWW member Demian Schroeder, who is not a Starbucks employee, entered the store at one point and initiated a conversation with McDermet. Schroeder told McDermet that he operated a cooperative bookstore, and had an interest in the sort of event that Starbucks was hosting. Subsequently, Schroeder left the store and joined the demonstrators outside.

McDermet left the store at about 8:30 p.m. As he was preparing to leave, Gross instructed the demonstrators not to touch him. Saenz echoed that admonition, and added, "spit on him." McDermet was still inside the store when she uttered those words.[60]

When McDermet exited the store the demonstrators began shouting, taunting him and chanting, "shame, shame, shame." After McDermet left the store, he turned onto 29th Street. As he walked away from the store a group of approximately six individuals, including Saenz, Fostrum, and Schroeder, began following him.[61] Saenz testified that Fostrum was the closest to McDermet, about 4 feet away.[62] During this time, Saenz shouted out to McDermet, "Jimmy, Jimmy, why won't you speak to us. Why are you ignoring your workers." She admitted making this, or similar statements, on more than one occasion. McDermet acknowledged that all he heard Saenz state to him was. "Jimmy, Jimmy, why won't you talk to us," "Jimmy, spend some time with us, Jimmy." As McDermet was being followed, one individual said, "We know where you live." According to the testimony of the General Counsel's witnesses, this comment was made by a stranger who had joined the demonstration and was tagging along. McDermet testified that it was Gross (who had, by then, been discharged) who made this comment. Fostrum's videotape shows that other participants in the demonstration uttered various comments including, "Fuck Starbucks," "Stand up for yourself," and "We are following you now, boy." McDermet did not offer testimony that he heard these other remarks, and they were not listed in the police report he subsequently filed. In any event, the evidence is clear that Saenz did not make any of these comments.

McDermet continued down 29th Street, while Fostrum continued to videotape and asked various questions including one about why he (Fostrum) had been discharged. As McDermet was about halfway down the block, two individuals joined him. One of these was identified as Starbucks Marketing Manager Dan Lewis, who did not testify herein. When McDermet reached Madison Avenue he turned left and proceeded toward 28th Street. At that time, Saenz was still part of the group following him, but she and Fostrum turned back shortly thereafter. At that point, Saenz shouted out, "See you next time, Jim."

McDermet testified that due to the fact that he was being followed, and the "we know where you live" comment, he took a circuitous route to his destination, which was in the vicinity of Pennsylvania Station.

By the time McDermet reached 28th Street, Lewis and his other companion had gone on their separate ways and he was being followed by approximately four individuals, including Schroeder. They continued walking along with him and at some point Schroeder attempted to engage McDermet in conversation. McDermet, who recognized Schroeder from their discussion in the store, said that it was deceitful of him to have passed himself off as someone who operated a bookstore when he was with the Union. Schroeder told McDermet that he was, in fact, a part owner of a cooperative bookstore. Then Schroeder attempted to explain the benefits of the Union to McDermet and why it would be good for workers if they were organized. McDermet stated that he did not believe that the IWW was qualified to organize Starbucks.

McDermet subsequently apprised Wilk of what had transpired during the course of the evening and also contacted the Starbucks partner and asset protection (P&AP) department, and was advised to file a police report, which he did on the following day, October 27. In the report, McDermet specifically named Gross, Fostrum, and Saenz. Of the three, Saenz was the only current employee. McDermet then spoke again with Wilk about the events which had transpired and specifically about Saenz' role in those occurrences. According to Wilk, P&AP Manager Steven Bova conducted an investigation which included speaking with Lewis and DM Tracey Bryant, who had been present in the store on that evening. None of these individuals testified herein and no report of the Company's investigation was placed into evidence.

DM Veronica Park testified that it was brought to her attention that Saenz had participated in a group outside of the book signing. The allegations were that she addressed McDermet as "Jimmy, Jimmy" and was part of a group that had taunted him by saying that they knew where he lived and had acted in an intimidating manner. Wilk recommended that Saenz be interviewed to ascertain whether her account corresponded with McDermet's and; if so, Wilk recommended that Saenz be terminated for her role in the incident. According to both Wilk and Park, the ultimate decision of whether to discharge Saenz would rest with Park, and Park testified that she had not made a decision about whether Saenz would be discharged prior to her interview. Park admitted on cross-examination that she was aware that Saenz had been participating in a union protest on the evening in question.

Park and Partner Resources Manager Joyce Varino met with Saenz on November 1.[63] Park asked Saenz if she had attended

[60] Respondent claims that Saenz also said, "piss on him." It is not clear from the video whether she actually made that comment. Even I were to assume that she did utter those words, however, it is apparent that McDermet was not in a position to overhear them at the time.

[61] Initially, McDermet testified that a group of approximately 20–30 individuals followed him for a total of about 13 blocks to Pennsylvania Station. All the other evidence adduced in the record, including Fostrum's videotape, shows this account to be significantly overstated, and Respondent apparently does not rely upon it in its brief.

[62] Similarly, Fostrum testified that he followed McDermet from a distance of about 5 feet.

[63] According to Respondent, this was the first opportunity they had to meet with Saenz, as she had not reported for work for several scheduled shifts in the interim. Saenz, when asked about this, testified that

the rally in question, to which Saenz answered in the affirmative. She was asked if she referred to McDermet as "Jimmy, Jimmy" in a disrespectful or demeaning way. Saenz admitted calling McDermet "Jimmy, Jimmy." Saenz also told Park that she didn't mean to be disrespectful, she was just trying to get his attention at the rally. Park asked if Saenz believed that McDermet may have felt threatened or intimidated by the situation and Saenz conceded that there were a lot of people chanting and he may have felt that way. Park also asked Saenz if she remembered hearing someone say, "We know where you live" to McDermet and she admitted that she may have heard someone say that, but did not know who. Then, Park discharged Saenz. At the time she was discharged, Saenz stated that she had been fired because she picketed. Park responded that she supported Saenz' right to picket and that was not the reason she was separated. As Park stated, she explained to Saenz that she was being discharged for treating one of her Starbucks partners disrespectfully. As Respondent asserts in its brief: "Park separated Saenz' employment because her disrespect toward McDermet violated Starbucks Guiding Principle of treating each other with respect and dignity."[64]

I note that, according to her testimony, at no point did Park specifically question Saenz about whether she had been following McDermet as he left the facility or how far she may have gone while following him. On cross-examination, Park admitted that she conducted no interviews of anyone else involved in this situation.

c. Analysis and conclusions

Counsel for the General Counsel argues that Saenz was engaged in protected, concerted activity and union activity during picket line conduct. The General Counsel argues that the circumstances of Saenz' discharge should be analyzed under the standard set forth in *Clear Pine Mouldings, Inc.,* 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).[65] Alternatively, counsel for the General Counsel argues that the matter should be evaluated under *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21 (1964). Counsel notes that the Act is violated where "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis for the discharge was an alleged act of misconduct in the course of that activity, and the employee was not, in fact, guilty of that misconduct."

Respondent first contends that, under the four factor analysis set forth in *Atlantic Steel,* supra, Saenz' conduct was not protected under the Act. Respondent further contends, under *Wright Line,* supra, it has met its burden of establishing that it would have discharged Saenz based upon her threatening and harassing behavior regardless of her union membership and sympathies.

It is undisputed that Saenz was discharged because of her conduct on October 26. This took place during a rally conducted by union supporters and members to protest, among other things, Starbucks employment practices and perceived hostility toward the Union. As such, it was concerted, protected conduct and union activity. I therefore agree with the General Counsel insofar as it asserts that a *Wright Line* analysis is not applicable in this case. It is properly analyzed under the four-factor criteria of *Atlantic Steel,* supra. That is, the question is whether Saenz' conduct was of a nature to remove it from the protection of the Act.

As to the first factor, the location of the alleged misconduct, Respondent argues that the fact that Saenz engaged in disrespectful and threatening conduct toward a regional vice president in front of other partners weighs heavily against a finding that her conduct was protected. It is the case, however, that Saenz was off duty at the time, demonstrating on a public sidewalk. Moreover, there is no evidence that any on-duty employees had any knowledge of or were in a position to overhear any comments she may have made to McDermet. In fact, the only other individuals who knew that she referred to McDermet in a purportedly disrespectful manner were her fellow demonstrators, none of whom were working at the time either. Accordingly, I find that the first factor, the place of the alleged misconduct, weighs in favor of protection.

The second factor, the subject matter of the discussion, similarly weighs in favor of protection. Saenz was part of a public protest of, among other things, Starbucks' wages and other working conditions. Her comments to McDermet are an outgrowth of this protest and are related to the Union's contention that management would not meet with employees to address these concerns.

As to the third factor, the nature of the outburst, Respondent relies upon Fostrum's video which shows that Saenz yelled "spit on him" and (as Respondent contends) "piss on him." Assuming that Saenz uttered these remarks, it is apparent from the video that these comments were made prior to McDermet exiting the store. Moreover, there is no evidence any Starbucks manager, or on-duty employee, had any awareness that such comments were made at the time or even prior to the videotape being shown at the hearing. Respondent additionally points to

she had been ill and had tried to call in but could not get through. In any event, Respondent does not contend that Saenz' failure to report to work or call in was a factor in her discharge.

[64] Contrary to the General Counsel I do not find that Park's interview of Saenz constituted an unlawful interrogation. Interrogation is not, by itself a per se violation of Sec. 8(a)(1) of the Act. The test for determining the legality of employee interrogation regarding union sympathies is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed employees by the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1989). Here, not only was Saenz a public and outspoken supporter of the Union, she was an open participant in a public demonstration of union support. I further note that Park confined her inquiries to the type of language employed by Saenz on this occasion and how that might have been perceived by McDermet, and did not question Saenz about her union activities or the union activities of other employees generally. Under these circumstances, I do not find that Park's inquiry rose to the level of an unlawful interrogation.

[65] In *Clear Pine Mouldings*, supra, the Board considered whether picket line misconduct was of a sufficient nature to justify a refusal to reinstate striking employees. The Board announced an "objective" test as had previously been formulated by the Third Circuit in *NLRB v. McQuaide, Inc*., 562 F.2d 519, 527 (Cir. 1977), i.e., "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of the rights protected under the Act."

the fact that Saenz was part of group that followed McDermet down the street calling out comments which Respondent characterizes as threatening and profane. Respondent, however, cannot attribute any of these comments to Saenz, and with the exception of the "we know where you live" comment neither was she asked about them in her termination interview. Further, it is apparent that, to the extent the originators of such comments can be discerned from Fostrum's videotape, they were made by individuals with male voices. Moreover, I note that Park never asked Saenz whether she followed McDermet down the street prior to her discharge, and, according to Park's testimony it did not factor into Respondent's decision to discharge her. Rather, the only behavior referred to by Park in supporting her determination to discharge Saenz related to her speaking disrespectfully to McDermet and referring to him as "Jimmy."

Nevertheless, the fact remains that Saenz was part of a group which followed McDermet as he left the facility and, individually, she did follow him for more than 1 city block. Although it is entirely understandable that McDermet may well have found the situation to be intimidating, on balance I do not find, however, that Saenz' conduct was so egregious as to remove her from the protections of the Act. As noted above, there is no evidence that Saenz used any threatening or profane language while she walked down the street behind McDermet, or that she was in physical proximity to him. Nor did she continue to follow him. In this regard, I note that McDermet's companions left him after a short while. Had the demonstrators' behavior been as threatening as Respondent now asserts, it would have been unlikely that they would have done so.

While it appears that Saenz did address McDermet in a disrespectful manner, Respondent points to no situation where such impertinence has been found sufficient to remove an employee from the protection of the Act. In fact, the Board has recognized that, "impropriety alone does not strip concerted conduct of statutory protection." *Aroostook County Regional Ophalmology Center,* 317 NLRB 218, 220 (1995), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996) (footnotes and citations omitted). Accordingly, I find that the third *Atlantic Steel* factor, frequently referred to by the Board as the "nature of the outburst" militates in favor of continued protection for Saenz.

As regards the fourth factor, whether the outburst was provoked by unfair labor practices, I conclude that this factor weighs against protection. It is however, clearly overshadowed by the place, subject and nature of Saenz' comments to McDermet which, admittedly, were the basis for her discharge. I conclude, therefore, by discharging Saenz because she spoke in a disrespectful manner to McDermet during the course of protected, concerted conduct, Respondent has violated Section 8(a)(1) and (3) of the Act.[66]

[66] Similarly, under the *Wright Line* analysis urged by Respondent, I would find that a violation of the Act has occurred. The General Counsel has established the requisite elements of union activity and knowledge. In addition, I infer animus from the surrounding circumstances, including the commission of contemporaneous unfair labor practices, as described above. I additionally infer animus from McDermet's initial testimony, which was false in that it clearly overstated the number of demonstrators who followed him on the street. Under *Wright Line*, I would also find that Respondent seized upon Saenz' disrespectful comments and tone of voice as a pretext to discharge her because in this instance, the personnel records offered into evidence clearly demonstrate numerous examples of disparate treatment. That is: Respondent routinely experiences situations where its managers are addressed in an impertinent or disrespectful manner or where employees have otherwise behaved contrary to Starbucks values and principles. The discipline meted out in such circumstances typically involves coaching, or written warnings for more egregious behavior. Thus, I would find that Respondent's reasons for discharging Saenz are pretextual. As Respondent cannot establish that it had a neutral nondiscriminatory reason for its decision to discharge Saenz, I would find that it had failed to meet its burden of proof in this regard.

6. The alleged unlawful evaluations, discipline, interrogation and discharge of Daniel Gross

There are various allegations of the complaint relating to Gross. Specifically, the General Counsel has alleged that Respondent unlawfully issued negative performance evaluations on January 29, April 14 and 29, and August 5, 2006; and that on August 5, 2006, Respondent issued a disciplinary corrective action to, and then discharged Gross. The General Counsel has also alleged that Respondent unlawfully prohibited Gross from speaking about the Union to coworkers while off duty and that Respondent further interrogated Gross and threatened him with discharge for engaging in concerted protected activities on behalf of the Union. Much of the conduct alleged to be unlawful with respect to Gross, in particular the various performance evaluations, and Gross' ultimate discharge, turn on employer motivation and, as such, are appropriately analyzed under *Wright Line*. Other allegations of the complaint as they relate to Gross are subject to an analysis under *Atlantic Steel,* as discussed below.

a. Respondent's process for evaluating employees

Generally, employees are evaluated every 6 months and are rated on a scale of 1 ("NI" or Needs Improvement); 2 ("ME" or Meets Expectations); or 3("CE" or Consistently Exceeds Expectations) in a number of designated areas which are, in turn, aggregated into one of two sections. Section A is entitled "Key Responsibilities"[67] and section B is lists attributes called "Starbucks Core Competencies." Each numerical grade may be accompanied by a narrative description. The scores for each section are averaged for an overall score which is, again a 1, 2, or 3, with the same corresponding designations. Each section of the evaluation counts for 50 percent of an employee's score. Employees who receive an overall score of 2 or 3 are eligible to receive a pay raise and those who receive an overall score of 1 have their performance monitored after a period of 90 days to see if there has been improvement. To reach the overall score, the average grade for the two sections is either rounded up or down to the nearest whole number.[68]

There are 10 areas designated as "Key Responsibilities" as follows:

[67] According to the evaluation form, key responsibilities are "taken from the job description and/or from other performance objectives for the position that are not detailed in the job description."

[68] For example, if the average is 1.4, that employee will receive an overall score of 1, or needs improvement. If the average is 1.6, then the score will be rounded up to a 2 and the employee will be deemed to have met expectations.

Delivers legendary customer service to all customers by acting with a "customer comes first" attitude and connecting with the customer. Discovers and responds to meet customer needs.

Provides quality beverages, whole bean and food products consistently for all customers by adhering to all recipe and presentation standards. Follow health, safety and sanitation guidelines for all products.

Acts with integrity, honesty and knowledge that promote the culture, values and mission of Starbucks. Maintains a calm exterior presence during periods of high volume or unusual events to maintain a clean and comfortable store environment.

Anticipates customer and store needs by constantly evaluating environment and customers for cues. Communicates information to the manager on shift so that the team can respond as necessary to create the "Third Place" environment during each shift.

Follows Starbucks operational policies and procedures, including those for cash handling and safety and security, to ensure the safety of all partners during each shift.

Maintains a clean and organized workspace so partners can locate resources and product as needed.

Recognizes and reinforces individual and team accomplishments by using existing organizational methods.

Contributes to positive team environment by recognizing alarms or changes in partner morale and communicating them to the management team.

Assists with new partner training by positively reinforcing successful performance and giving respectful and encouraging coaching as needed.

Maintains regular and consistent attendance and punctuality.

In addition, there are eight enumerated Starbucks Core Competencies, as follows:

1. Customer Focus—Delivers legendary service that meets and exceeds all customers' expectations.

2. Ethics and Integrity—Adheres to Starbucks values, beliefs and principles during both good and bad times.

3. Composure—Remains calm, maintains perspective and responds in a professional manner when faced with tough situations.

4. Personal Learning—Takes personal responsibility for the continuous learning of new knowledge, skills and experiences.

5. Dealing with Ambiguity—Able to successfully function during times of uncertainty and changing priorities.

6. Decision Making—Makes timely and quality decisions based on a mixture of analysis, wisdom, experience and judgment.

7. Interpersonal Savvy—-Builds effective relationships with all people; up, down and sideways, inside and outside of Starbucks.

8. Results Oriented—Gets results and achieves goals.

b. Gross' work history and early performance evaluations

Gross was hired to work at Respondent's 36th Street store in May 2003. In November 2003, Gross received a performance review with an average rating of 2.3 in key responsibilities and 2.5 in Starbucks core competencies for an overall rating of 2.4. The review lists "legendary service" as a significant accomplishment and identifies certain "performance improvement opportunities," these being, "setting personal goals for continued growth" and "increase bean knowledge." At that time, the manager administering the review was Beth Jamison, an individual who does not appear to have a role in any other decisions made with respect to Gross' employment as are relevant to this case.

On May 28, 2004, shortly after the representation petition was filed, Gross received another performance review, this one administered by SM James Cannon. Gross received a 2.7 average rating in terms of key responsibilities a 2.75 rating in Starbucks core competencies. For the review period, Gross' overall rating was evaluated as a 3 (or consistently exceeds expectations). Among Gross' significant accomplishments were listed: "(1) his ability to establish relationships with both customers and partners alike; (2) his ability to keep a calm composure during times of high volume; and (3) his continued competency in his role and the willingness to guide others." Performance improvement opportunities were identified as follows: "pursuing further knowledge of Starbucks culture and product (i.e., community involvement, coffee knowledge (coffee master?))" and "communication with new management." In its brief, Respondent points to other narrative comments made by Cannon made in conjunction with Gross' scores in the key responsibilities section of the review. For example, Cannon stated that "Dan's awareness of his environment and his communicating any concerns in it to the new management is an area of opportunity for him." Cannon further stated that Gross, "needs to work in communicating changes in partner attitude (concerns, compliments, complaints) to the new management team. In another section, Cannon wrote, "While Dan may be aware of the organizational methods of recognition, it is unclear whether he has utilized them." On this review, Cannon did not give Gross a 1 or "NI" in any area.

Gross received his next review from Cannon on May 27, 2005. In the area of key responsibilities, Gross received an overall score of 2.1. He received two "1" ratings in this section of the evaluation. In the area of "Recognizes and reinforces individual and team accomplishments by using existing organizational methods," Cannon wrote, "Dan to my knowledge has not given any MUG awards or recommended anyone for a Green Apron card." As regards the category, "Contributes to positive team environment by recognizing alarms or changes in partner morale and communicating them to the management team," Cannon wrote that "Dan has always had the opportunity to further his communication skills with management." Cannon's comments in other areas of the review are not fully legible, but it appears that he described Gross at this time as a "good partner" whose significant accomplishments included his "continued ability to connect with customers" and "his knowledge and tenure which allows him to assist others when they

are unsure." Cannon identified Gross' performance improvement opportunities to include, "further[ing] his coffee knowledge and increase[ing] his communication with management about issues that arise during his shifts."

c. Gross' availability and limited work schedule

All baristas are part-time employees who are scheduled for work based upon their availability and the needs of the store to which they are assigned. When he was initially hired, Gross placed no restrictions upon his availability. After 6 months, Gross limited his availability to 5 days per week. In August 2004, Gross began attending law school and further limited his availability to 2 days per week, Saturday and Sunday, between the hours of 12 p.m. and 6 p.m. Between May 2005 and January 2006, Gross acknowledged that he "didn't work as many shifts as he had previously." I found Gross' testimony about this issue to be, on whole, needlessly evasive because Respondent was readily able to establish that during the 8-month period between May 16, 2005, and January 28, 2006, Gross worked a total of 25 hours. During the summer of 2005, Gross was employed elsewhere and he "gave away" virtually all of his shifts to a coworker who needed the extra income. Gross did not work any shifts whatsoever between November 13, 2005, and January 28, 2006.

Gross acknowledged that sometime during this period, in the fall or winter, SM Cannon told Gross that he had not been seeing him in the store, and complained that he had been giving away his shifts. Gross responded that Cannon's comments seemed discriminatory to him, but he would not give away any shifts in the future. After this time, Gross did not give away any shift for which he was scheduled. It is undisputed, however, that after Cannon spoke with Gross he did take time off. His testimony that these leaves of absence would have to be approved by store management was not rebutted. According to Respondent, it treated Gross' requests for time off just as it would have treated those made by any other employee.

d. Other employees with limited work schedules

As will be discussed below, the General Counsel contends, in part, that Respondent seized upon Gross' limited availability as a pretext to justify his discharge. There was evidence adduced regarding other employee work schedules in an attempt to show that Gross was treated disparately from other employees. Respondent, conversely, relied upon evidence to show that Gross worked less during the relevant period than any other employee.

As noted above, there are general provisions in the partner guide about minimum work schedules, but there is no specific minimum number of hours an employee must work.[69] The record reflects that there are any number of employees who juggle work with other responsibilities requiring flexible schedules. The General Counsel points to Monica Thompson, who worked at the same store as did Gross, and was a full-time student. During the academic year 2005–2006, Thompson worked a total of 56 shifts, or an average of approximately 1.5 shifts per week. Respondent notes, however, that during the period from May to November 2005 (which Respondent asserts is the relevant period for the purposes of Gross' January 2006 evaluation), Thompson worked 98 shifts compared to Gross' 6.

The General Counsel additionally points to employee Jenny Robateau's testimony that she was permitted to go off the schedule at 36th and Madison during 3 months during the summer of 2006 without any formal paperwork or request for leave, and worked at another Starbucks near her home during this period. In the summer of 2007, she was permitted to take leave to travel for a period of approximately 1 month. The General Counsel further relies upon the testimony of Sarah Bender who, beginning in April 2007, worked two shifts per week for a total of 8–11 hours. As Respondent notes, however, this arrangement lasted for a period of just a few months.

In short, in agreement with Respondent I find that there is insufficient record evidence to establish that any other employee consistently worked as few hours as Gross did during the period from May 2005 up to the date of his discharge.[70]

e. IWW activity from November 2005 to January 2006

Gross testified that, beginning in about November 2005, there was a major escalation in IWW activity, much of which involved him personally. This included the November 18 announcement and associated leafleting at the Union Square East store. As has been described above, Gross was prominently involved in that series of events. The General Counsel also relies upon testimony that on November 23, Gross signed and personally delivered a letter registering the Union's protest regarding the fact that the managers at the 9th Street store were not allowing their employees to wear union buttons. Gross was also one of the organizers of the Black Friday event, spoke publicly, and moderated the press conference as Ayala and others spoke to reporters.

In addition, Gross was quoted in a New York Times article regarding that rally, and Respondent's CEO, Jim McDonald, sent a message to employees in response to that article, which was posted in the stores. During this period, Gross generated various news releases which also appeared on the Union's web site and which featured his name and contact information. In January 2006, Gross posted a press release comparing the health insurance Starbucks offered to its employees unfavorably with that offered by Wal-Mart. In January 2006, he was quoted in various publications, including the New York Sun, about IWW initiatives in the New York geographic area. It appears from the record that Respondent made efforts to counter what it deemed to be negative publicity caused by these

[69] This policy states that "Partners may be expected to make themselves available for wok for a minimum number of days or hours per week, depending upon the store's need. The inability or failure to increase one's availability to work may result in separation of employment."

[70] Malchi testified that in May 2007 he began working one shift per week for a period of 4 to 8-1/2 hours. This continued for approximately 1 month. At that time, his store manager informed him that he would have to pick up at least one more shift, as it did not make sense for him to work only 1 day per week. Malchi began working one additional shift per week, but found that his schedule could not accommodate it. He told his manager that he could not manage the schedule, and he was told that he could not work only one shift per week. Malchi then decided to resign his position with Starbucks.

press releases, through their own press releases and communications to employees.

f. Gross' January 2006 performance review

Under Starbucks' policy, Gross should have received his next review on or about November 27, 2005, 6 months after his prior review. As noted above, however, Gross did not work any shifts between November 13 and January 28. Thus, Cannon did not administer this review until January 29, when Gross finally returned to work. Cannon advised Gross that he would be administering the review and directed Gross to prepare coffee using the French Press method for the meeting. Coffee brewed in this manner is not on the menu at Starbucks' retail stores; however, coffee is sometimes prepared in this fashion to promote various products sold by Starbucks. Thus, baristas may, from time to time, prepare coffee according to this method to market such products.

Gross was unsure of the proportions and brewing time and asked for information from two coworkers, neither of whom were certain either. Cannon commented that Gross had been giving away his shifts and now he could not even prepare a French Press. Gross prepared the coffee pursuant to Cannon's instructions and brought it into the back room. Cannon and DM Mark Anders were present. The coffee was tasted, and Cannon asked Gross to recite the four essentials of good coffee, which he did.[71] Gross asked why Anders was present for the administration of the performance review. According to Gross, Cannon said that there was a new policy that a district manager would be present when an employee received either a "needs expectations" or "exceeds expectations" on a performance review. Gross asked to see the policy in writing. Anders then stated that there was no policy, it was just a "best practice."

Cannon then provided Gross with the performance review[72] and read through several of the narratives that had been written with respect to various categories. In this review, Gross had received ratings of "1" in 9 of the 18 categories in the review, and had received no "3" ratings. His overall score, 1.4, was rounded down to a 1.

According to Gross, other than reading from the evaluation itself, Cannon failed to explain why Gross' performance was deemed to have declined so precipitously.

In the evaluation, reference was made to Gross' lack of availability for work and its purported effect on his job performance: "Dan does not maintain adequate hours of availability. Therefore he is rarely scheduled to work. When he is scheduled, Dan frequently asks other partners to work his shifts for him." It was also stated that because Gross "worked only infrequently" he "has had little exposure to the seasonal lineup" and "has not demonstrated that he has kept up his knowledge of current promotional items." In this particular key responsibility, however, Cannon also wrote that "Dan is familiar with our beverages enough to know the basic standards of recipe and presentation." Gross received a "2" in this category.

Gross acknowledges that Cannon made a reference to his having given away shifts. Gross testified that he reminded Cannon that after he had been spoken to about this matter, he had not given away any more shifts. Anders asked Gross to fill out a new form designating his availability for work. Gross asked Anders if he was stating that Gross would have to open up his availability in order not to get an unfavorable performance review, and Anders said no. Gross filled out a new form: however, his availability remained unchanged from what it had been before.

Other narrative comments relating to those key responsibilities in which Gross' performance was deemed to need improvement include the following: "Dan does not display behaviors that would indicate a positive attitude about Starbucks to partners and customers;" "Dan will communicate regarding tasks at hand allowing management to know that he is aware of the need to complete them, but he is not proactive;" "Dan has not utilized any organizational methods for recognition of other partners;" "Dan has not been involved with the training of any new partners or has he made mention of any desire to help them along."

As regards Starbucks core competencies, Gross received scores of "1" or "NI" in the following areas: "Ethics and Integrity—Adheres to Starbucks values, beliefs and principles during both good and bad times;" "Personal Learning—Takes personal responsibility for the continuous learning of new knowledge, skills and experiences;" and "Interpersonal Savvy—Builds effective relationships with all people; up, down and sideways, inside and outside of Starbucks." Under performance improvement opportunities Cannon wrote, "[o]pening his availability to give him exposure to and the opportunity to work with new partners and products."

Gross received ratings of "2" or "ME" in the areas of: deliver[ing] legendary customer service . . .; provid[ing] quality beverages . . .; follow[ing] Starbucks operational policies and procedures . . .; maintain[ing] a clean and organized workspace . . .; customer focus . . .; composure . . .; dealing with ambiguity . . .; decision making . . and [being] results oriented. . . .

Gross signed the review under protest, writing that he strongly disputed his ratings and suggesting that they be modified across the board.

Cannon filled out a PAN, electronically recording Gross' "needs improvement" rating, stating: "Dan did not work frequently enough to warrant a high score. We are hoping that with an increase of shifts that [Gross] works over the next review period that we can help him bring up his scores by exposing him to promos and partners."

The only evidence adduced by the General Counsel regarding any change or lack of change in Gross' work performance during the period encompassed by the evaluation was as follows:

> Q. Just referring to, I'm going to ask you about two meetings, January 29th and April 14th, did any of the managers present say anything to you about why they didn't mention anything about your calm exterior demeanor.
>
> A. No, they didn't mention anything about that.

[71] These are: water, grinds, proportion, and freshness.

[72] The review had an effective date of November 27, 2005.

Q. Other than what it says here, did any of the managers . . . explain to you what they meant by you didn't display a positive attitude.

A. No they did not.

Q. With respect to your demeanor and how you handled yourself in the store during times of high volume, did you change in any way, shape or form between May '05 and January '06.

A. No.

Q. Once again, the same question about the same two meetings but about a different category, January 29, 2006, April 14, 2006, did any of the managers on either or those occasions explain why you got a number one in category four on page 1, "Anticipates company and store needs?"

A. No they did not.

Q. Finally, going to page 2, the last category in Section A, "Maintains regular and consistent attendance, punctuality," other than what it says on the document and other that what you've already testified to about the two meetings, did you receive any further explanation of why you got a one in that category? Other than what you've already said, on January 29th or April 14.

A. No.

Q. During the time frame of let's say May 2005 until January 2006, were you consistently late?

A. No, I was not.

Q. Do you have a number of no call, no shows?

A. No, I did not.

Q. Did your attendance and punctuality in that regard change at all from the time you began at Starbucks [until] January 2006?

A. It did not.[73]

Thus, Gross offered testimony rebutting the downgrading of his performance in areas such as composure, his ability to anticipate store needs and his punctuality. It appears undisputed, however, that Gross did not meet company standards in other areas such as utilizing existing organizational methods to recognize coworkers, training new hires and communicating partner morale issues to store management. Respondent presented no evidence, other than what is contained the evaluation itself and PAN notice, to establish why Gross' job performance had suffered such a decline. Neither Cannon nor Anders, neither of whom presently work for the Company, testified herein. Respondent presented no evidence that it made any effort to contact these potential witnesses or that they were unavailable.

Respondent argues that the above-performance evaluation was an accurate assessment of Gross' job performance and was not discriminatorily motivated. Respondent points to the fact that SM Cannon had rated Gross on at least two occasions prior to January 2006. On the first evaluation, administered by Cannon 10 days after Gross had publicly announced his support for the Union, in May 2004, Cannon rated Gross as exceeding expectations. The review Cannon prepared in May 2005, more than 1 year after Gross announced his support for the Union and after Gross had engaged in numerous activities on behalf of the Union, contained several ratings where Gross had been found to meet or exceed expectations. As Respondent urges, these evaluations defeat any contention that Cannon acted with animus in preparing Gross' less favorable January 2006 review. Respondent further argues that, inasmuch as Gross had been openly engaging in numerous union activities for well over one year before receiving the January 2006 review, the timing actually undermines an inference of animus.

Respondent further contends that several of the areas identified in the January 2006 review as needing improvement had been raised in prior evaluations. In this regard, earlier reviews had urged Gross to improve communication with management and utilize organizational recognition methods to recognize the contributions of his coworkers. As Respondent notes, between May 2005 and August 2006, Gross worked fewer hours per week than any other partner in the district, and did not work at all between November 13, 2005, and January 28, 2006. According to Respondent, this fact alone justifies Gross' overall ratings.

Respondent also argues that there is no evidence that Gross was treated in a disparate fashion from other employees and cites to several performance evaluations where employees received ratings of "1" in those categories where Gross was deemed to need improvement.

As noted above, the General Counsel apparently does not contend that the performance review was inaccurate in several respects. Nevertheless, the General Counsel argues that it is discriminatory. In support of this argument, the General Counsel relies heavily on comments regarding Gross' failure to "display behaviors that would indicate a positive attitude about Starbucks to partners and customers." The General Counsel notes that that was the first occasion where Gross had received any written remarks about his attitude. The General Counsel additionally points to the absence of favorable comments regarding Gross' ability to remain calm and steadfast during periods of high volume, which had earned him ratings of 2 or 3 in the past.[74] The General Counsel further points to the timing of the review, noting that such remarks came directly after Gross had engaged in frequent, open and notorious activities on behalf of the IWW.

As discussed above, to establish that this performance review is discriminatory, the General Counsel has the initial burden of establishing a prima facie case that Gross' union activities were a substantial or motivating factor in the actions taken by Respondent. Here, the requisite elements of union activity and employer knowledge clearly exist. In addition, I conclude that the General Counsel has adduced sufficient evidence of animus to meet its initial burden. In so finding I concur with the General Counsel that Respondent's comments about Gross' attitude, absent any specific explanation by Respondent, constitute some evidence of an unlawful motive.

The Board has repeatedly held that a reference to an employee's "attitude" can be found, in the appropriate context, to constitute evidence of unlawful motivation. See, e.g., *Clima-*

[73] Of course, the General Counsel's questions regarding punctuality, time and attendance fail to acknowledge that Gross worked only minimal hours during this period.

[74] I note, however, that under Starbucks core competencies, Gross received a "2" in this area.

trol, Inc., 329 NLRB 946, 946 fn. 4 (1999), and cases cited therein; *Children's Studio School,* 343 NLRB 801, 805 (2004) (claim that employee was discharged because she did not have the "right spirit" and for being unwilling to work together as a team deemed similar to accusing the employee of a bad attitude, which is veiled reference to protected activities).

Respondent argues that Cannon's reference to Gross' attitude does not constitute evidence of animus or pretext. In this regard, Respondent points to Gross' admission that having a "good attitude" is a skill relevant and important to the job duties of a barista. As Respondent notes, the record contains evidence that employees with no apparent connection to the Union have been counseled or received ratings of "1" as a result of a poor job attitude. Respondent concedes that a vague assertion that an employee has a "bad attitude" may at times indicate a veiled reference to union activities, but argues that the Board has recognized that an employer may reasonably expect its employees to perform their job functions with a good attitude. Respondent further argues that the Board has found that rating employees based on subjective criteria such as "attitude" is not, by itself, evidence of union animus.

Respondent's argument here might be more compelling if it had adduced evidence, either through testimony or even through specific examples as set forth in Gross' performance evaluation, of ways in which his poor attitude had some impact upon the way he performed his job. Here, there is no such proof.[75] To the contrary, Gross had been found to meet expectations in areas regarding customer service (including acting with a "*customer comes first attitude*") beverage preparation, the maintenance of his work space and his adherence to safety, security and cash handling procedures, among others. Gross was also rated as meeting expectations in the area of "Customer Focus—delivering legendary service that meets and exceeds all customers' expectations." I conclude therefore, in the absence of any explanation to the contrary, that the nonspecific, unexplained reference to Gross' failure to evince a positive attitude is, in fact, a veiled reference to his union activities, and evidence of animus. I draw a similar conclusion from Respondent's apparent and unexplained conclusion that Gross failed to "adhere[ ] to Starbucks values, beliefs and principles during good and bad times."

The burden now shifts to the Respondent to show that the January 2006 performance review was not discriminatory. The evidence adduced by the Respondent to rebut this prima facie case consists of the fact that Gross worked minimal hours during this period, in conjunction with whatever is contained the evaluation itself and PAN notice. With regard to Gross' work schedule, I note that in the PAN notice Cannon specifically tied Gross' lack of hours to his poor work performance. Again, however, Gross was rated as meeting expectations in virtually all of the categories relating to customer service and drink preparation. I further note that there is unrebutted evidence that Respondent gave its approval to Gross' requests for time off during at least some portion of evaluation period. Based upon the foregoing, I conclude that Respondent has failed to meet its burden of coming forward with specific, probative evidence to establish that it would have evaluated Gross in a substantially similar fashion notwithstanding his union activities. See *Saginaw Control & Engineering, Inc.,* 339 NLRB 541, 543 (2003) (poor evaluation was held to be discriminatory where respondent could not show that it would have administered the same evaluation even in the absence of union activity).

In reaching this conclusion, however, I am mindful that the General Counsel has failed to present evidence to show that the January 29 performance evaluation was inaccurate in certain respects where Gross' performance was found not to meet company standards. In this regard I find that that the prima facie case established here was a relatively weak one which, quite possibly, could have been overcome by some direct evidence from the Respondent. In any event, even if I were to conclude that the General Counsel had failed to adduce sufficient evidence to meet its burden to show that this particular performance review was discriminatory, I would find, based upon subsequent events as discussed below, that the General Counsel has adduced substantial evidence of unlawful motivation with regard to Gross, relating to later performance evaluations and his eventual discharge.

g. Change of management at the 36th Street store

In March 2006, Cannon was transferred and Jose Lopez became the store manager of the 36th Street store. At about the same time, Paul Grzegorczyk became district manager. Lopez testified that, at the time he took over the store, he discussed the partners and their strengths and weaknesses with Cannon. Lopez acknowledged that Cannon told him that Gross was "involved" with the Union. Lopez testified that, generally, there was very little discussion of Gross or his union activities among managers or in e-mails about the Union. Nevertheless, Lopez was aware that Gross was a spokesperson and organizer for the IWW. As Lopez testified, all you had to do was pick up a newspaper and read his name.

According to Lopez, Cannon went through Gross' January 2006 performance review and also provided him with examples of conduct which Cannon perceived as disruptive of store operations. According to Lopez, Cannon told him that Gross had put the wrong beans in the coffee bin, so that customers ordering decaffeinated coffee would receive regular and vice versa. Cannon also purportedly told Lopez that Gross purposefully made the wrong drinks during the store's peak periods in an effort to disrupt operations. I note that none of these examples of purportedly subversive behavior are documented in Gross' performance reviews or in any other employment record introduced into evidence by Respondent as part of its defense to the allegations of the complaint. I find that such misconduct would have been, at the very least noted and it is more likely than not that Gross would have been disciplined for such insubordination. Absent such lack of corroboration, I do not credit Lopez' hearsay testimony regarding these prior alleged acts of misconduct.

[75] While I do not draw an adverse inference from Respondent's failure to produce and question either Cannon or Anders, Respondent still bears the burden, after the General Counsel has adduced its prima facie case, of coming forward to show, by a preponderance of the evidence, that it would have administered this negative performance evaluation to Gross, notwithstanding his protected conduct.

h. The April 14 performance evaluation

Cannon asked Gross to come into the store on April 14, for an initial meeting with Lopez and Grzegorczyk. As Lopez testified, he also wanted to go over Gross' last performance review, and discuss performance "opportunities" so that he and Gross "could be on the same page."

When Gross arrived at the meeting, he was introduced to the new managers. He had brought along a coworker, Ivan Hicanpie, and requested to have Hincapie present as a witness. His request was declined. According to Lopez, Gross then became "irate," "slammed his fist on the table really hard and said, 'this is insane'" and left the store. Gross concedes that he left the facility, but testified that he told the managers he was going to take a moment to consider whether to continue with the meeting without a witness. Gross then went outside to confer with Hincapie and returned shortly thereafter.

Upon his return, Cannon and Lopez went through a performance evaluation which had been prepared with an effective date of November 27, 2005. Cannon read through various categories. Under both key responsibilities and Starbucks core competencies, Gross received an average score of 1.5; thus, that was his average rating on the evaluation as well. According to the evaluation anything up to 1.5 is deemed to be a "Needs Improvement" overall score. In those particular areas which were deemed to need improvement under key responsibilities, the comments on the review included the following:

> Dan has continued not to display any behaviors that would indicate a positive attitude about Starbucks to partners and customers.
>
> Dan continues to communicate needs (i.e., 10 minute slide, trash removal) but does not take the initiative to complete without direction. He has not taken a proactive approach to contributing to the "Third Place" environment during his shifts.
>
> Dan has yet to recognize any partners utilizing organizational methods of recognition (i.e., Green Apron Cards, MUG, etc.).
>
> Dan continues not to communicate information about morale or other partner issues to his managers or ASM's at any time during the review period.
>
> Dan has not been involved with the training of any new partners; he has not made mention of any desire to do so. He has not made attempts to coach or connect with newer partners other than minimal introductions.

Gross' score was upgraded to a "2" in the area of "Maintains regular and consistent attendance and punctuality." With respect to this issue, it was written that: "Dan, as agreed to during his last review, has worked all of his shifts as scheduled and has been on time and in dress code on all occasions."

As regards the Starbucks core competencies, Gross received a "1" in the following areas:

> Ethics and Integrity—adheres to Starbucks values, belief's (sic) and principles during both good and bad times.
>
> Personal Learning—Takes personal responsibility for the continuous learning of new knowledge, skills and experiences.
>
> Decision Making—Makes timely and quality decisions based on a mixture of analysis, wisdom, experience and judgment.
>
> Interpersonal Savvy—Builds effective relationships with all people; up down and sideways, inside and outside of Starbucks.

As Cannon read through this evaluation, Lopez, who had not yet worked with Gross, expressed his intention set Gross "up for success." Gross asked some questions: for example, he asked whether, if a barista were to tell him that they felt overtaxed at the bar, or underpaid, would that be the kind of thing Gross would have to communicate in order to receive a favorable rating; and he was told, "yes." Gross also asked whether he would have to promote a belief that unions are inappropriate at Starbucks to get a favorable rating relating to adhering to Starbucks values. There was no response to this inquiry.

Gross stated that the document was inaccurate and clearly discriminatory and that the Company would have 2 weeks to remedy the review or the Union would take legal action. He then left the facility.

There are two versions of this document in evidence. One, which is the version Gross was given on April 14, is neither signed nor dated. The other, which was among those documents produced to the General Counsel pursuant to subpoena, is signed in the space designated for a manager's signature and dated April 3, 2006. This version of the April 14 performance evaluation includes a final page containing additional material. Gross' testimony that he was never shown this page is unrebutted. The additional material is as follows:

> Additional Comments Section B—Core Competencies
>
> Dan has demonstrated ineffective decision making. He has chose to not act in a manner conducive to personal development by not proactively taking part in activities that would increase his performance level. He has not acted on feedback provided regarding recognition of fellow partners, and acts in a 'disengaged' manner when displaying behaviors that embrace the culture, values and mission of Starbucks.
>
> Additional Comments Significant Accomplishments and Performance Improvement Opportunities
>
> *Dan has maintained consistent attendance (as scheduled). It is still recommended that Dan widen his availability for continued development in his role. Dan's lack of recognition of feedback is a barrier to his ability to be open to suggestions and finding solutions for further development*. [Emphasis in original.]

The General Counsel argues that, with one exception, the April 14 performance review was simply a continuation of the prior discriminatory review issued to Gross on January 29. The one difference here is that Gross was noted as having worked all shifts as scheduled and thereby received a "2" in the area of attendance and punctuality. Nevertheless, his aggregate score was insufficient to achieve a "meets expectations" rating.

Respondent argues that the April 14 performance review was conducted pursuant to its policy to reevaluate employees 90 days after receiving a "needs improvement" performance re-

view. Respondent argues that this was not an adverse employment action because it failed to raise any performance issues that had not been previously brought to Gross' attention during the January 2006 evaluation and that neither had any impact on his terms and conditions of employment.[76] Respondent asserts that Cannon's purpose in holding the meeting was to introduce Lopez and to provide an opportunity to discuss those areas of Gross' performance which had previously been identified as needing improvement. In the alternative, Respondent asserts that even if the performance evaluation did constitute an adverse personnel action, the General Counsel has failed to establish a nexus between Union animus and the discipline imposed.

I agree with Respondent that the record does demonstrate instances where employees have received 90-day interim performance evaluations after receiving a "needs improvement" review, and do not draw any conclusions from this fact, standing alone. Nevertheless, for the reasons set forth in connection with the January 29 review, in particular those similarly nonspecific comments about Gross' attitude and lack of adherence to Starbucks values, culture and ethics, I find that there is some evidence that this review was discriminatorily motivated.

In addition, and of particular note, is the undisputed fact that Gross was presented with version of this document which omitted commentary on his performance in particular areas where he was found to need improvement. If the purpose of the review was, in fact, to provide Gross with an opportunity for improvement, there would seemingly be no valid reason for failing to provide him with all appropriate feedback. This is particularly the case with regard to the issue of "availability," which as will be seen below, was a recurrent theme. Although Cannon had previously identified "increasing his availability" as a performance improvement opportunity, Gross' testimony that he had been told that he need not increase his availability to receive a successful rating in the area of attendance and punctuality is corroborated by the fact that, in this evaluation, Gross was deemed as meeting expectations by virtue of the fact that he worked all scheduled shifts. Now, Respondent was apparently "recommend[ing]" that Gross increase his availability; however, it failed to so advise him. In this regard, I note that Lopez offered no testimony that Gross had been informed of this recommendation during his meeting with the managers.

Thus, Respondent has failed to explain how neglecting to show Gross certain salient comments and recommendations in connection with his performance evaluation can, in any sense of the phrase, be deemed to be part of a legitimate effort to "set [Gross] up for success," as Lopez asserted. Accordingly, based upon the foregoing, I find that the April 14 performance evaluation was pretextual. Inasmuch as Respondent has failed to show, by a preponderance of the credible evidence, that it would have administered the same evaluation to Gross in the absence of his protected conduct. I conclude that it is discriminatory. *Saginaw Control & Engineering, Inc.,* supra.

[76] As Gross was not due for the semiannual review of his performance until July 2006, he would not have been eligible for a wage increase until that time.

i. Lopez' log book

Following the April 14 meeting, Lopez and Gross worked shifts together on April 15, 22, and 23, all prior to Gross receiving an April 29 "Update on Performance," discussed below.

As Lopez testified, he kept a running log of events occurring at the store. In the log, relevant portions of which are in evidence, there are various notations dealing with Lopez' interactions with employees, their interactions with each other and coaching conversations and other discipline administered to employees. Lopez testified that this log is not complete as it does not reflect the full measure of his observations about or coaching conversations with employees.

Between April 14 and 29 there are several notations about Gross. On April 15, which is the first shift Lopez and Gross worked together, Lopez wrote:

> Interaction with Dan Gross
>
> Dan was friendly with me today. It felt very superficial. He arrived on time (12pm—4pm) and left exactly at 4 pm.
>
> I had a coaching conversation with Dan regarding his beard. He claimed that 'neat was in the eye of the beholder.' When I asked him if he ever reviewed the dress code policy he stated 'I don't recall.' I reminded him the expectation was to keep his beard neat moving forward.
>
> I also reviewed the updated policy change with Dan.[77] It took him 20 min. to review it. He asked a question regarding our new soliciting policy. He then wrote on the actual memo 'anywhere in the store' and then asked me to sign it. I refused to sign it and I stated that the memo was very clear. He then said, 'no problem.'

On Saturday, April 22, the next shift worked with Gross, Lopez' log reads as follows:

> Dan worked 12-4, arrived clean shaven and seems (acts) very positive. He assigned a till and displayed good cust. service skills. He sampled pastrys. *Side Note: Aislynn mentioned that her and Dan were going to the apple store together to purchase a laptop. Dan was supposed to assist her in picking up the right lap top.*

On April 23, the only notation regarding Gross relates to Lopez's observations of his interaction with a coworker named Charles and his having overheard Charles tell Gross that he will call him later.[78]

j. The April 29 update on performance

The next time Lopez and Gross worked together was April 29. At the beginning of Gross' shift, Lopez summoned him into the office and Gross was given an "Update on Performance" which is dated April 27 (the "Update"). Lopez testified that he drafted this memorandum based upon his observations of

[77] It appears from the timing and the context that this is a reference to the new policies adopted pursuant to the March 2006 settlement agreement.

[78] Charles Polanco, an IWW supporter, was employed at the 36th Street store during this period of time.

Gross' work performance. The document states, in relevant part:

> This document will serve as a summary of recent conversations regarding your progress towards the areas of opportunities identified in your last performance review. . . [Your] inadequate attendance record largely contributed to your inability to demonstrate several of the key responsibilities and core competencies of your barista position. For instance, you did not demonstrate initiative in the following areas:
>
> Engaging in legendary, positive interactions with partners and customers at all times;
>
> Participating in active sampling and demonstrating an understanding of all promotions;
>
> Communicating to the management team on enhancing the customer experience;
>
> Contributing to a positive work environment by exhibiting behaviors such as distributing green apron cards and MUG awards to your co-workers.
>
> These are just some examples of the behaviors that you will need to exhibit to be considered as meeting the expectations of your role as barista.
>
> Dan, it is my intention to set you up for success and to provide you with the tools and resources you need to excel in your role. To date, I have not seen a marked improvement in the areas listed above. However, I am committed to working with you so that you can fulfill all of the areas of opportunity identified in your performance review. To that end, we will set your next performance review for July 29, 2006, or as soon after that date as possible. This will give you the full benefit of time to demonstrate improvement. . . scheduling your performance review for July 2006 will give you a full six months to improve your availability and work on the areas identified above. At that time we will evaluate your performance and determine your performance status. Please note that it is extremely important for you to demonstrate acceptable performance in all the key responsibilities and core competencies of your position and that your failure to improve in the areas indicated above will result in the termination of your employment with Starbucks.

Upon reviewing the document Gross demanded to know who wrote it. Lopez stated that he had authored it, and Gross asked whether he would be willing to testify under oath to such effect. Gross was asked to sign the document, and refused.

Lopez recorded this meeting in his log as follows:

> Daniel Gross arrived at the store on time. I sat him down at the MWS to review and explain his new performance date. I began to explain to him why we are moving forward with this new date (7/29/06). My key points were that this date will benefit him due to the amount of hours worked that six month period (slightly over 25 hours). He read the entire document and refused to sign it. He stated, 'It's my right not to sign it.' He then asked me 'who composed the document.' I told him that the document was from me, he then nodded his head and asked 'Will you say that in a court of law?' I then ended the conversation and repeatedly asked him if he had any questions regarding the document/review date or areas of opportunity that were listed on the document. He said no, and at that point the conversation was over (I gave him his copy). I intentionally planted us in front of the camera's view (12:10 pm). The document was clearly visible through this conversation. He also reviewed the document during his 10 min. break (2:04 pm). Dan's demeanor changed after this conversation. He was not as friendly with me. After Dan punched out he said goodbye to everyone on the floor except for myself. I did tell him to have a good weekend (he didn't respond).

Thus, as of the time Lopez administered the update to Gross he had worked with him on only three occasions. As documented in Lopez' log for that period of time, Gross displayed some initial resistance to Lopez' directive that he trim his beard, but had complied as of the next time he returned to work. He engaged in some legal gamesmanship with Lopez over the new no-solicitation policy, but eventually let the matter drop. He acted in a friendly manner toward Lopez, seemed "positive," displayed good customer service skills, sampled pastries, and offered to assist a coworker in a nonwork matter. This description of Gross' conduct fails to comport in significant part with the update where he was specifically found to be lacking in positive interactions with customers and partners, and had allegedly failed to participate in the sampling and promotion of products, among other things. In fact, there is not one instance where Lopez noted inadequate performance in any the areas outlined in the update. Further, Lopez failed to identify from his experiences supervising Gross any other particular instance which would substantiate his assessment of such perceived work deficiencies at this particular point in time or to explain the disparity between the observations recorded in his log, and the assessment of Gross' work performance as reflected in the update.

As such, I conclude that the update is pretextual and, accordingly, constitutes persuasive evidence of Respondent's unlawful motive with regard to its future actions toward Gross. See *Laro Maintenance Corp. v. NLRB,* 56 F.3d 224, 229 (D.C. Cir. 1995) ([W]hen the employer presents a legitimate basis for its actions which the fact finder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but "that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (quoting *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966)).

I additionally find, that by issuing this document, which is tantamount to a negative performance evaluation, Respondent has violated Section 8(a)(1) and (3) of the Act.

k. Additional log entries regarding Gross' conduct at and outside of work

On May 6 Lopez noted the following:

> Charles hung around after his shift and waited for Dan to arrive. They sat down in the care area and exchanged a few words before Dan punched in for his shift. Daniel was not as friendly with me as he was in the past. I intentionally mentioned the cash reward to him and other partners in a group

setting.[79] Daniel had no comment but the rest of the partners were excited to hear that. Dan was assigned to do a coffee tasting, as he did (Columbia w. esp. brown) as he was able to describe. Dan continued his shift and left exactly on time.

Lopez also made a notation about one of Gross' coworkers, named Willy, who had a substantial cash shortage, and further wrote, "Willy went out of his way to tell me that Dan called him at home to discuss his cash shortage problem. Dan offered his advice, which was, 'You don't have to sign any documents.' Willy wanted no part of that discussion and told him, 'thanks, but no thanks.'"

l. Lopez speaks with Gross about contacting partners outside work

Lopez testified that on about May 12, 2006, two partners approached him separately and complained that Gross had been contacting them outside of work, making them uncomfortable. One of the employees, Jenny Robateau, testified herein.

Robateau testified that Gross made about five or six attempts to contact her outside of work, by calling her on her cell phone or speaking with her directly, asking if she had any problems with Lopez. Robateau reported these conversations to Lopez and told him that they were a "little annoying." Lopez instructed Robateau to fill out an incident report, which she did. This report was not introduced into evidence.

The reports from Gross' coworkers are recorded in Lopez' log book. On May 10, Lopez wrote: "Willy approached me and told me that he feels really uncomfortable when Daniel calls him at home to discuss Union activities. He does not want him to call him at home." Similarly, on May 12, Lopez noted that, "Jenny and I sat down and discussed her future transfer (5/20). She also brought up the fact that Dan calls her outside of work to discuss Union info. She stated that she wants no part of those discussions and feels very uncomfortable."

According to Gross, he was working his shift on May 13 when Lopez called him into the back room. Lopez stated that he had gotten complaints from two partners that Gross had harassed them, and he was not to call Starbucks workers on the telephone any more to talk about Starbucks. Gross asked for their names, and Lopez refused to provide that information. Gross asked Lopez what would happen if he were to continue to call employees to talk about Starbucks and Lopez stated that "we would be back here again."[80]

Lopez testified that, after the baristas in question approached him about this matter, he sat Gross down in the back room and "asked him about it." Lopez asserted that he told Gross that it was his right to call whomever he wishes after work, and he cannot monitor that, but if a partner claimed harassment, then its his responsibility to address that. After some initial evasiveness, Lopez admitted that that he knew Gross had been calling these partners about the Union, and that Robateau had told him that Gross had been repeatedly calling her about joining the Union. Lopez further described his meeting with Gross in his log. His log entry for May 13 reads as follows:

> Dan and I had a conversation regarding calling partners at home. Partner[s] recently approached me and told me that [they] felt uncomfortable with Daniel Gross calling them at home (or cell). Dan told me that maybe someone else called them and used his name (which wasn't the case). I also mentioned to him that these actions weren't creating a work environment (which was classified as an opportunity during his last review.) He didn't agree with me because he wanted to know which partners approached me. I was not going to tell him.

The complaint alleges that Lopez unlawfully prohibited employees (in this case, Gross) from discussing the Union while off duty. According to both Gross and Lopez, Lopez did not specifically mention the word "union" but made a more general reference to Starbucks. In both his log and testimony Lopez admitted, however, that he knew that Gross had been calling employees to discuss the Union. Moreover, it would have been apparent to Gross, or to any other employee for that matter, what Lopez was referring to when he admonished Gross that his actions weren't creating a good work environment, which was, as Lopez noted, an area in which Gross previously had been told he must improve his performance.

It is well established that employees are entitled to discuss unions and solicit for unions on nonworking time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945), *Peyton Packing Co.,* 49 NLRB 828, 843–844 (1943), enf. 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). It follows therefore, that employees have, at the very least, the same Section 7 right to discuss union matters or working conditions outside of work, where issues of production or discipline are not directly implicated. Further, The Board has found that union solicitations do not lose their protected status simply because a solicited employee rejects them, or feels bothered or harassed by them. *Frazier Industrial Co.,* 328 NLRB 717, 718–719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Even persistent and repeated union solicitations do not constitute harassment if the soliciting employee does not act in an offensive or threatening manner. *Frazier Industrial,* supra; *RCN Corp*. 333 NLRB 295, 300 (2001). See also *Consolidated Diesel,* 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). Here, there is no such evidence of threatening behavior or of harassment. Accordingly, by counseling Gross that his off-duty interactions with employees (which all knew were union related) did not contribute to a good working environment (which had been identified as an area in which Gross was expected to improve his performance), Lopez engaged in conduct which has a reasonable tendency to restrain the exercise of Section 7 rights and Respondent thereby violated Section 8(a)(1) of the Act.

[79] Inasmuch as Gross had received a "NI" rating on his last performance review, he would have been ineligible to receive this cash award. The General Counsel has suggested that Lopez was deliberately attempting to provoke Gross by this comment.

[80] According to Gross, Lopez also complained that when Gross entered the store that day, he failed to greet Lopez and that such conduct was a violation of Starbucks guiding principles and was not creating a positive work environment. Gross replied that he had never heard of such a policy, and his failure to greet Lopez was in protest of the April 29 update.

m. The allegedly unlawful discharge of Gross

(1) Evidence adduced by Respondent regarding Gross' work performance

ASM Tiffany Scott had worked with Gross on several occasions between May and August 2006. According to Scott, Saturdays tend to be slow days, so employees use this occasion to clean the store. According to Scott, Gross' performance was "mediocre" in that he did not take initiative, and always had to be asked to do things. Scott acknowledged that Gross performed his assigned tasks, but did them very slowly.

On one occasion, as Lopez was cleaning the baseboards, he received a telephone call and asked Scott to finish the task. Gross approached her and asked Scott if that was what she got paid to do, she was so much better than that, she should not be cleaning floors. Scott replied that they were all baristas, and there was no task too little or big for anyone. Scott reported Gross' comments to Lopez.

According to Scott, she typically would meet with Lopez every Monday to discuss barista performance. Other than the one specific incident described above, Scott could not recall any discussion with Lopez regarding Gross' job performance.

Respondent additionally adduced testimony about Gross' job performance from Robateau, who worked with Gross on several occasions in 2006. Robateau initially testified that Gross' job performance was "satisfactory, a little average." Under further questioning from Respondent, Robateau then stated that Gross was not very knowledgeable about things in the store, and he did not clean during "down times." Robateau asserted that rather than clean, Gross would take breaks or sample products. Robateau further asserted that Gross performed his tasks slowly, seemed obnoxious and not productive and that his knowledge of drinks was limited.

Robateau recounted a conversation with Gross about the issue of cleaning and stocking. He told her that it was not part of her job description to clean, and she was doing more work than she had to.

On cross-examination, counsel for the General Counsel adduced testimony that Robateau is a full-time college student who works at the 36th Street store during the academic year, and who is allowed to work at a Starbucks location near her home during the summer months. She additionally took an extended leave in the summer of 2007 to study abroad. Thus, the General Counsel asserts, Robateau is the recipient of favored treatment by Respondent, which would tend to color her testimony. During her cross-examination, Robateau additionally acknowledged that employees are expected to tell a manager when they leave the floor for their breaks. I note that there is no evidence, or assertion from Respondent, that Gross took unauthorized breaks during his shift.

Lopez testified that he believed that Gross' comments to Scott, as described above, did not help to create a good work environment in the store. In addition, Lopez testified that Gross was not enthusiastic and did the "bare minimum." He failed to check the duty roster and had to be reminded of daily tasks, or else he would not do anything. Lopez further testified that Gross was not enthusiastic. By way of example, Lopez cited a basic trash run. Gross would take out one bag of trash at a time rather than putting all the trash in the bin at one time, as other partners did. Thus, while it took other employees 10 minutes to do a trash run, it would take him 25–30. Lopez stated that he had to remind Gross to clean the blender pitchers every time he made a Frappuccino. He took a long time to wash dishes rather than just giving them a quick rinse and placing them in the sanitizer. According to Lopez, there were also a few times where he made an incorrect beverage during a peak period on a Saturday. He had to be reminded to get caught up with new promotional material. On cross-examination, Lopez admitted that there is no reference in his log regarding the need to remind Gross of daily tasks, Gross' failure to consult the duty roster, his method of removing trash or washing dishes, doing the "bare minimum" or making drinks incorrectly. A log entry dated July 22 notes that Gross spearheaded a coffee tasting.

Respondent also relies upon the undisputed fact that Gross failed to open up his availability beyond Saturdays and Sundays. He requested many Sundays off, so he rarely worked both shifts on a weekend. Thus, between April 14 and August 5, when he was discharged, Gross worked only five Sundays.[81]

(2) The July 15 demonstration and Allison Marx incident

Evan Winterscheidt, a shift supervisor at a Starbucks facility located at 14th Street and 6th Avenue (the 14th Street store) and member of the IWW had been suspended, pending investigation, for engaging in an altercation with a coworker. On July 15, 2006, Gross was among a small group of union members who picketed at the store to protest the discipline.[82] DM Allison Marx was at a meeting at the time and was called about the demonstration. She, together with DM Karen Schueler came down to the facility.[83] As Marx and Schueler approached the entrance to the store, Gross stepped forward and identified himself as Daniel Gross, asking, "Are you Allison Marx?" Marx relied in the affirmative and Gross said, "It would be very bad for you to fire Evan Winterscheidt." He repeated that statement several times, as his voice became louder and he was pointing at Marx.[84] Marx told Gross not to threaten her, and entered the store.

Later that evening the police were called and told the demonstrators that they were required to have a permit for the type of picket sign they were carrying. The demonstration disbanded. Sometime during this evening Gross called Marx at her company-issued cell phone number. He left a message, stating that any action taken against Winterscheidt would be met with a "swift response."

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[81] Respondent acknowledges that Lopez granted Gross' requests for time off, and asserts that this is consistent with how it treats other partners.

[82] The demonstrators were carrying signs that said, "Unlawful Firing at Starbucks," "Stop Union busting at Starbucks," and "IWW." They were chanting, "Reinstate Evan."

[83] Marx did not testify. According to Respondent, she is on medical leave and unavailable due to the recommendation of her physician.

[84] According to Schueler's testimony, at one point Gross's finger was within six inches of Marx's face. In the statement she later prepared for Respondent, however, Schueler stated that she had entered the store ahead of Marx, and did not explain how she came to observe Gross' gestures.

Marx reported Gross' comments to Wilk, who met and obtained statements from both Marx and Schueler. Both managers reported that they had felt distressed and threatened by Gross' behavior and comments, and Wilk referred the matter to the P&AP department for further investigation. The matter was assigned to investigator Marc Stella.

Stella first spoke with Marx and obtained a voluntary statement from her about the event. During Gross' shift on July 29, 2006, he was asked to meet with Stella and DM Grzegorczyk. At the outset of the interview, Gross requested a union witness, and his request was denied. Stella presented Gross with a "Consent to Interview" form. In relevant part this form states that, by signing the form, an individual is acknowledging that Starbucks may continue the interview for as long as necessary; that the individual is free to leave but that failure to cooperate may result in disciplinary action. Gross refused to sign the document, and Stella read it to him. Then Stella commenced the interview. He asked Gross if he recalled a conversation with Marx on July 15, to which Gross answered in the affirmative. Gross admitted to stating, "Don't fire Evan" but stated that he could not recall saying anything else, such as "It will be very bad for you." Gross was asked if he had blocked the door to the facility and stated that he had not, and could provide witnesses that would attest to that. Stella asked Gross if he had touched Marx and Gross said that he had not and that if such an allegation surfaced he would sue Starbucks for slander.[85] Gross was asked if he had been spoken to by the police about the incident, and he stated that he had not. Stella asked Gross if he could recall anything else from the event, and Gross stated that he could not. On several occasions during the interview, Gross asserted his right to organize and protest in support of a fellow employee. According to Stella, he reminded Gross that their conversation was about his interaction with Marx, not his right to organize. Stella requested that Gross write a statement about his interaction with Marx, and Gross stated that he would not do so without a union lawyer present. Stella advised Gross that, in that case, the matter would be reviewed based upon the facts that were known, without Gross' explanation as to what had occurred. Stella said that a determination on the matter would be made by partner resources.

The General Counsel has alleged that Stella unlawfully interrogated Gross on this occasion. In assessing whether an unlawful interrogation has occurred, the Board looks to see "whether under all the circumstances the interrogation tends to restrain, coerce or interfere with rights guaranteed by the Act." *Rossmore House,* supra. Here, I do not agree with the General Counsel that Stella's questioning of Gross met that standard. As an initial matter, Gross was a well-known and outspoken union supporter, who was engaged in a public demonstration during the relevant period. Moreover, I credit Stella that he limited his inquiries to Gross' specific interaction with Marx rather than Gross' general union activities during that evening. Marx had lodged a complaint regarding Gross' conduct, and Stella was investigating it. I find that it was appropriate, as part of this investigation, to ask Gross whether he made the statements and other gestures attributed to him. Further, it appears that the Respondent made a reasonable effort to prevent the discussion from broadening into inquiries about Gross' other union activities. Accordingly, under all the circumstances, I do not conclude that Stella's questioning of Gross rose to the level of an unlawful interrogation. See, e.g., *Bridgestone Firestone South Carolina,* 350 NLRB 526, 528–529 (2007).

The General Counsel further has alleged that by advising Gross that his failure to cooperate in an investigation of alleged misconduct might lead to disciplinary action taken against him, Stella unlawfully threatened Gross with discharge. I do not agree with the General Counsel that Gross was, in this instance, threatened with discharge for engaging in protected conduct. While it is true that the alleged misconduct took place in the overall context of protected activity, Stella's admonition to Gross referred to his cooperation in an investigation of specific allegations of threatening behavior leveled by Marx and, not to his protected conduct generally. Accordingly, I recommend that this allegation of the complaint be dismissed.

(3) Gross' written warning for the Marx incident, final performance evaluation- and discharge

(a) The warning for the Marx incident

Lopez, Grzegorczyk, and Partner Resources Manager Varino met with Gross during his next scheduled shift, August 5. Lopez informed Gross that Respondent had completed his investigation into the July 15 incident and determined that Gross had engaged in inappropriate threatening behavior toward Marx. He was presented with a corrective action which stated that Gross had "aggressively confronted the DM when she tried to enter the store" and "threatened her by pointing at her face and saying repeatedly, 'It would be very bad for you to fire Evan'" The corrective action cited Gross for a "clear violation of our guiding principle to treat each other with respect and dignity."

It is undisputed that Gross' interaction with Marx, for which he was disciplined, took place during a concerted employee protest of the suspension of a fellow employee. As such, Gross' conduct on this occasion is evaluated under the four factor analysis of *Atlantic Steel,* supra.

As to the first factor, the place of the incident, Gross was off-duty, on a public sidewalk and not in proximity to any on-duty employee. This factor weighs in favor of protection. The subject matter of the discussion arose in the context of a concerted demonstration of support in response to discipline issued to a fellow employee and union member. All the indicia accompanying the protest concerned themselves with this issue or support for the IWW generally. Gross' comments to Marx pertained specifically to this concerted, protected activity. Thus, the second *Atlantic Steel* factor similarly weighs in favor of protection. Regarding third factor, the nature of the incident, Gross' conduct on this occasion is, in my view, is not sufficiently opprobrious to cause him to lose the protection of the Act. It may well be the case that Marx interpreted his manner and comments as threatening, as Schueler testified. Neverthe-

[85] According to Stella's testimony, he also asked Gross if he had pointed at Marx, if he had pointed a finger in her face or if it had been perceived in that fashion and Gross stated that he did not recall. I note however, that Stella's written account of the interview which was made shortly after it occurred does not reflect that he asked Gross whether he had pointed at Marx.

less, although Gross was confrontational, his comments were sufficiently ambiguous so as not to rise to the level of a threat against Marx, nor did he use profanity or otherwise engage in egregious conduct. See, e.g., *Fairfax Hospital,* 310 NLRB 299, 300 (1993) (employee who threatened supervisor with "retaliation" uttered in a heated exchange regarding the respondent's unlawful no-solicitation rule found to retain the protections of the Act). While Gross apparently repeated his comments, but they were uttered as Marx was entering the facility and therefore not sustained over any significant period of time. Accepting as the truth the fact that Gross pointed his finger at Marx, I find that insufficient to establish that his conduct was of a character which would render it unprotected. I find, therefore, that the third *Atlantic Steel* factor militates toward continued protection. Finally, although the Union demonstration occurred in a context where unfair labor practices had occurred, they did not involve Winterscheidt's suspension and the incident in question was not directly provoked by any unfair labor practices which have been found here. Accordingly, this factor tends to weigh against protection. In conclusion, I find that, while Gross was apparently aggressive and challenging in his interaction with Marx, his actions failed to rise to a level which would cause him to lose the protection of the Act.

Accordingly, I find that by issuing Gross a written warning for the Marx incident, Respondent violated Section 8(a)(1) and (3) of the Act.

(b) The final performance review and discharge

At this meeting, Gross was also presented with a final performance review. Its effective date is August 5, 2006. Gross received an aggregate score of 1.4 under key responsibilities (receiving six scores of "1") and an overall rating of 1 in Starbucks core competencies.[86] Among the comments included in the evaluation are the following:

> Dan does not display any behaviors that promote the culture[,] values and mission of Starbucks. Dan performs only the bare essential functions of the barista position when directed, but he does not participate in the life of the store [or] actively contribute to a positive store environment or say anything positive about the culture, values and mission of Starbucks either to customers or fellow partners.
>
> Dan can perform basic barista tasks when directed, but he does not take any initiative to anticipate customer and store needs. He seems to be focused on doing the bare minimum, and makes little effort to create a positive experience for customers or his fellow partners. He has not taken a proactive approach to create the 'Third Place Environment' by communicating issues to his management team (i.e. blown light bulbs, music volume, inventory/small wares needs etc.).
>
> Dan does not utilize our existing organizational methods to recognize any partners (i.e. Green Apron cards, MUG awards, star skills, etc.).
>
> As stated above, Dan does not contribute to a positive team environment in any way. He does not contribute to the life of the store or to creating a positive work experience for his fellow partners. In fact, some partners have specifically asked not to be scheduled with Dan because they do not feel comfortable working with him. He has not communicated any partner morale issues to his Store Manager.
>
> Dan has not been involved with the training of any new hires, which would be expected of a 3 year tenured partner. Dan does not take the limited opportunities he has had to provide positive reinforcement and coaching to new partners, for example in operational areas and regarding new products (retail, entertainment, beverage or food.).
>
> Since his last performance review in January 2006 when his poor attendance was identified as a critical area for improvement, Dan has not opened up his availability. Although he has worked more shifts than before his January review, he has not consistently worked even the two days he has availability, frequently requesting Sundays off. Dan has met the expectation of working both Saturday and Sunday only five times since his January review. So while he has worked with slightly higher frequency, his attendance has not improved to a satisfactory level.

As regards Starbucks core competencies, Gross received the following ratings:

Customer Focus (2); Ethics and Integrity (1); Composure (1); Personal Learning (2); Dealing with Ambiguity (2); Decision-Making (1); Interpersonal Savvy (1); Results Oriented (2).

The evaluation additionally contained the following corresponding "Comments on Core Competencies:"

> 1. Dan is generally polite to customers but he does not seek ways to provide legendary service and exceed all customers' expectations.
>
> 2. Dan does not demonstrate commitment to Starbucks values, beliefs and principles. Dan has also received a corrective action for an incident in which he displayed poor judgment when he verbally threatened DM Allison Marx on July 15, 2006, which resulted in the police recommending that she file a police report.
>
> 3. Dan when meeting other partners has not at times remained in a calm and respectful manner demonstrating patience and resilience at all times.
>
> 4. Dan has not learned new skills; he has not taken personal responsibility to pursue his own development within the company, but has instead blamed others for his lack of growth within Starbucks.
>
> 5. Dan has adapted to shifting priorities or changes in role when working, he slides to secondary positions and completes assignments.
>
> 6. Dan does not demonstrate the level of experience and judgment expected of a partner of his tenure in recognizing warning signs or signals before problems emerge. He seems content to do the bare minimum required and does not display initiative or act proactively to improve the environment for customers or fellow partners. Dan also received a corrective action for an incident in which he dis-

[86] Gross' average score for this component of the evaluation was actually 1.25, but his score was rounded down to the nearest whole integer.

played poor judgment when he verbally threatened DM Allison Marx on July 15, 2006, which resulted in the police recommending that she file a police report.

7. Dan does not connect with or show an interest in his peers or management team.

8. Dan has demonstrated that he can be good at figuring out the processes necessary to getting things done. He does not, however, display leadership in coaching or mentoring other partners to do the same.

Lopez presented Gross with his final review, and read the comments. He then informed Gross that he was being discharged. Gross responded that the "process is not over" and that he "looked forward to this being played out."

(c) The decision to discharge Gross

Lopez testified that the decision to discharge Gross was solely his. When asked by counsel for the General Counsel if he had spoken with any other managers prior to reaching this decision, Lopez stated that he had "informed" DM Grzegorczyk, who had left the decision entirely up to him. According to Lopez, the termination decision was based upon "all performance." The factors which entered into this determination included Gross' failure to come in both days on the weekend; the fact that he requested days off; his overall attitude and the fact that he did the bare minimum—if he was not asked to do something, he did not do it. Lopez additionally testified that he viewed Gross' comments to Scott as an attempt to undermine him.

Wilk similarly testified that Lopez made the decision to fire Gross. However, under questioning from counsel for the General Counsel, it became apparent that others were involved in this process. Wilk acknowledged that she had been consulting with Lopez throughout his tenure at the store. Prior to the administration of Gross' final performance review, Lopez met with Wilk, DM Grzegorczyk, and Partner Resources Manager Varino. According to Wilk, Lopez stated that he wanted to discharge Gross, and the group concurred. Wilk also testified that there were two meetings regarding the decision to discharge Gross, and she was uncertain whether Lopez had attended both. Wilk testified that when she saw the final performance review, she did not change any ratings, but made changes to the content and the way it was worded because she felt that Lopez could have gotten a little more specific.

In addition to the managerial personnel involved in the meetings described above, Wilk testified that she spoke with other company personnel including McDermet and company legal counsel to keep them apprised of developments.

Wilk initially testified that while the Marx incident had been incorporated into the final review, in her opinion, the rating would have been the same regardless of the incident. In later testimony, when asked whether the Marx episode was one of the incidents which had led to Gross' discharge, Wilk replied in the affirmative.

I do not credit testimony that Respondent left the decision to discharge Gross entirely up to Lopez. I find it highly improbable that such a decision would have been entrusted to a store manager with less than four months experience directly supervising this employee, given the long history and probable legal ramifications involved. Moreover, although I found that Wilk was a reluctant witness on this issue, it is apparent that numerous other managerial personnel, as well legal counsel, were involved in the discussion. I doubt that the involvement of these high-level officials was simply to "rubber stamp" a determination made by a low-level manager with regard to this prominent union supporter.

(4) Analysis and conclusions

There is no doubt that Gross was an active supporter of the Union and that this activity was well known to Respondent. In fact, it would be fair to say that Gross was frequently a "thorn in the side" of Respondent during the course of events in question. Acknowledging this, Respondent makes several arguments in an attempt to undermine the General Counsel's prima facie case under *Wright Line*.

Respondent also argues that even if the General Counsel could demonstrate that Starbucks' communications and conduct in response to anticipated or actual union activity somehow constituted evidence of general animus toward the Union, the existence of such general animus, by itself, cannot sustain the General Counsel's burden with regard to Respondent's decision to discharge Gross. Thus, Respondent argues that there is no nexus between the decision to discharge Gross and his union activities and, therefore, the General Counsel cannot sustain a prima facie case under *Wright Line*.[87]

Respondent argues that there is no evidence of Lopez harbored any animus toward Gross for his union activities. In particular, Respondent cites to Robateau's testimony that Lopez was "very respectful" toward Gross, as he was toward other employees. Respondent further argues that the performance evaluations placed into evidence by the General Counsel show

[87] In support of this assertion, Respondent relies upon *Wegman's Food Markets, Inc*., 351 NLRB 1073, 1078 (2007), and *Allied Mechanical Services,* 346 NLRB 326, 330 (2006). In *Wegman's Food Markets*, the administrative law judge found that an antiunion video shown to employees, which was not alleged to be unlawful, did not establish a nexus between union animus and the discharge in question. In particular, the judge found that there was nothing in the video which suggested that the respondent's hostility toward the union was such that it was willing to violate the law by discriminating against employees to keep the union out. Such a circumstance is clearly distinguishable from the instant case, where there is substantial evidence of unlawful conduct alleged, and as I have found, proven by the General Counsel. In addition, in that case, the judge found that the employee in question had not been engaged in union or concerted activity protected by the Act or that the respondent had any knowledge or reason to believe that he had. Rather, the employee in question was discharged because he was a marginal employee who failed to adequately perform the duties of three different positions and who had had previously been warned about making disrespectful comments toward his supervisors and, moreover, had taken a dismissive attitude toward the many disciplinary actions taken against him. Id. Thus the circumstances presented there are inapposite here. In *Allied Mechanical Services*, supra, the Board declined to find that the respondent harbored animus toward one employee on the basis of its treatment of another employee and further refused to impute general animus based upon the fact that the respondent had been obliged to reinstate a number of union members and give them backpay based upon prior antiunion conduct. Again, for a number of reasons, the circumstances presented there are different from those found here.

that most employees who receive "needs improvement" performance ratings separate their employment before the end of the next 6-month review cycle, and that they are frequently discharged within a matter of weeks. Respondent contends that its lack of animus toward Gross is documented by the fact that it not only allowed him to remain employed through the next review cycle despite his failure to improve his performance, it extended his review period specifically to give him additional time to improve. Respondent contends that, unlike other partners, Gross never took steps to improve his work performance. Thus, it is contended, the General Counsel cannot establish that Gross was treated less favorably than other partners.

Respondent further contends that animus cannot be inferred based upon the timing of Gross' discharge. In this regard, Gross clearly engaged in open and substantial union activities throughout 2004, 2005, and 2006, including conspicuous participation in multiple large-scale protests and "actions" against the company in 2004 and 2005, for which he received no discipline. Respondent asserts that the timing actually proves to the contrary: had Starbucks wanted to discharge Gross based upon his union activity, it could have done so much earlier. Respondent has a point here, however the General Counsel convincingly argues that there was a particular escalation of union activity beginning in November 2005 which was not only deemed disruptive by Respondent, but was highly publicized. Thus, an argument can fairly be made that the timing of the downgrading of Gross' performance corresponds to the escalation and, moreover, supports the General Counsel's theory of the case.

As I have noted above, I do not credit the testimony of Respondent's witnesses that it was Lopez who, single handedly, made the decision to discharge Gross. Moreover, even if I were to credit such an assertion, I find that the evidence does establish that Lopez harbored animus toward Gross' protected conduct. For example, Lopez specifically admonished Gross about calling coworkers outside of work. I note that other managers frequently told employees that what they did on their own time was their own business. Not so with Lopez, who made it clear that he felt that such (protected) attempts to communicate with coworkers about the Union did not create a good working environment. And, as noted above, I have found that the April 29 "Update on Performance" constitutes persuasive evidence of animus, whether this emanated from Lopez individually or Respondent institutionally. And, as has been discussed above, I infer animus generally from the commission of various unfair labor practices, some of which were aimed at Gross individually.

Thus, I have found that the General Counsel has made out a prima facie case that Gross' protected conduct was a substantial or motivating factor in his discharge. Accordingly, the burden now shifts to the Respondent to establish, through a preponderance of credible evidence, that it would have discharged Gross notwithstanding his Union and other concerted protected conduct. *Wright Line,* supra. Respondent makes a number of arguments in this regard.

Respondent contends that due to Gross' lack of availability and overall performance it would have discharged him regardless of his union activity: "Indeed, it is difficult to imagine any employer retaining an employee who rarely worked and who, when he did, exerted little effort and encouraged co-workers to follow his lackluster example." In this regard, Respondent points to the testimony of Scott and Robateau, which was essentially unrebutted by the General Counsel. Indeed, it may be fair to say that the picture that emerges of Gross' work performance, in general, is one of an employee who worked infrequently, whose primary goal was to organize employees on behalf of the IWW and was otherwise disengaged from the Starbucks employee culture. Nevertheless, Respondent has pointed to no incident where Gross was insubordinate, refused to follow work instructions or engaged in misconduct while on the job. Similarly, there is no evidence that he was unable to perform the job responsibilities of a barista. In fact, his performance evaluations reflect that his drink preparation and customer service skills were deemed adequate in every circumstance. There is no documentation of assertions, raised at the hearing that he deliberately tried to sabotage customer service by preparing and serving the wrong beverage to customers.

Respondent further asserts that, on multiple occasions, Gross was given express feedback into those areas of his performance which needed improvement and that he made no effort to address such deficiencies. In particular, Respondent points to the express request, made in January 2006 and again on April 14, that Gross increase his "availability and hours in the store." Respondent concedes that Gross stopped giving away shifts after Cannon raised the issue with him, but also points to the fact that Gross continued to request Sundays off between April and August 2006, and worked only five Sundays during this period of time.

The issue of Gross' overall availability is a complicated one. It is true that Gross worked less than any other employee during the relevant period. Nevertheless, I credit Gross' unrebutted testimony that Anders told him he would not have to increase his "availability": that is, commit to working more days or hours, to improve his performance review. In this regard, I note that in his April 14 review, Gross received a "meets expectations" rating notwithstanding the fact that his availability had not changed. It is also the case that Respondent's recommendation, as set forth in the April 14 review, that Gross increase his availability, was never presented to him. Thus, there is no evidence that Gross was ever informed that he had to increase his availability to receive a favorable performance review. Moreover, Respondent apparently approved all of his requests for time off. As has been noted above, there is no documentation in any of his performance reviews, or other probative evidence, that Gross' actual hours of work, or his lack of "availability," compromised his ability to prepare drinks or serve customers in an adequate fashion. I therefore find that Respondent's reliance upon the fact that Gross worked very few hours is pretextual because there is no probative evidence that his restricted work schedule concretely impacted his ability to perform the basic functions of a barista, or otherwise disrupted the operations of the store.

Additionally, in its brief, Respondent asserts that that, "Gross took every opportunity to undermine his managers' authority and store morale generally." In support of this contention, Respondent relies upon the testimony offered by Scott and Robateau, which has been described above. In this regard, relying

upon *Fredon Corp.,* 323 NLRB 564, 569 (1997), Respondent argues that Gross' situation is indistinguishable from other cases where the Board has recognized that an employer does not violate the Act where it terminates a vocal union supporter upon his refusal to improve his work performance. Further, Respondent cites to other situations where employees have been terminated for refusal to accept feedback, lack of initiative and bad attitude.

As an initial matter, I note that Gross' conversations with coworkers about work assignments and wages generally is concerted activity. Here, there is no evidence that Gross sought to prevent employees from completing their tasks or otherwise interfered with their work assignments. While certain of Gross' coworkers may not have welcomed such comments, the Board has held that other employees do not have to "accept" an invitation to engage in concerted activity for the invitation to be protected. *Whittaker Corp.,* 289 NLRB 933, 934 (1988). Moreover, although Respondent apparently maintains a rule that such conversations are not permitted, I have found that such a rule had been applied in a discriminatory fashion and further conclude that such brief conversations, absent evidence of workplace distraction, are protected conduct. *Waste Management of Arizona,* supra. Thus, to the extent Respondent relies upon Gross' workplace discussions of terms and conditions of employment with his coworkers to justify its decision to discharge him, to cite these conversations as proof that he failed to create a positive work environment or to impugn his "attitude" about his employment, such reliance evinces an unlawful motive.

Respondent additionally relies in significant measure upon Gross' final performance review in support of its determination to discharge Gross. However, it is apparent that in various areas where Gross' performance was rated inadequate or needing improvement, concerted, protected conduct is cited. Thus, according to the narrative which accompanies the ratings in at least two Starbucks core competencies, Gross' interaction with Marx is specifically referred to as a reason for the "1" rating received in these categories. In addition, under one "Key Responsibility" rating where Gross received a "1" it is asserted that "[Gross] does not contribute to the life of the store or to creating a positive work environment for his fellow partners. In fact, some partners have specifically asked not to be scheduled with Dan because they do not feel comfortable working with him." There are no examples of this cited in the evaluation and I note that neither Scott nor Robateau testified that they had made such a request. Respondent points to no other evidence to support this assertion and the only record evidence which appears to relate whether employees felt uncomfortable working with Gross involves his attempts to contact them outside of work to discuss the Union, conduct which is protected under the Act.[88]

[88] As the General Counsel notes, in his log entry on May 13, 2006, Lopez essentially admitted that the union solicitations he discussed with Gross, in his view, were directly related the issue of creating a good work environment. This corresponds to the language used in Gross's final performance review.

Thus, I find that in several areas where Gross' performance was found to be unsatisfactory, his protected conduct was cited as a basis for such a conclusion. Moreover, the final performance review echoes prior commentary regarding Gross' failure to adhere to Starbucks values and beliefs, which I have found to be a veiled reference to his protected conduct. I therefore disagree with Respondent that this performance evaluation demonstrates a neutral, nondiscriminatory basis for Gross' discharge. Rather, I concur with the General Counsel that the evaluation is, in and of itself, direct evidence of Respondent's unlawful motive.

Thus, as described above, Respondent has pointed to Gross' attendance, his lackluster work performance, and his overall attitude in supporting its determination to discharge him. I have evaluated these claims above. Respondent has failed to come forward, however, with sufficient probative evidence to rebut the General Counsel's strong prima facie case. While Gross may not have been a model employee, the record demonstrates that he was proficient in preparing beverages and customer service. His cash-handling skills were adequate. He worked infrequently, but as I have noted, Respondent gave him no specific guidelines in this regard, and routinely approved his requests for time off. In the areas where his performance was found lacking, protected activity was often cited as the basis for such a conclusion. Moreover, substantial evidence demonstrates that Respondent's downgrading of Gross' performance in several critical areas was pretextual. On whole, therefore, Respondent has not established that the perceived deficiencies in Gross' job performance would have been a sufficient basis for discharge, absent protected conduct. Accordingly, I conclude that by discharging Gross, Respondent has violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Starbucks Corporation d/b/a Starbucks Coffee Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local 660, Industrial Workers of the World (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following acts and conduct, Respondent has violated Section 8(a)(1) of the Act:

(a) Prohibiting employees from discussing the Union while off duty.

(b) Discriminatorily prohibiting employees at Respondent's Union Square East store to use a company bulletin board to post items of a nonwork nature, including materials relating to the Union.

(c) Prohibiting off-duty employees employed at Respondent's Union Square East store from entering the back of the store.

(d) Implementing and enforcing a rule prohibiting employees from wearing more than one prounion button at any given time.

(e) Promulgating and maintaining a rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

(f) Promulgating and maintaining a rule prohibiting employees from talking about terms and conditions of employment.

4. By the following acts and conduct, Respondent has violated Section 8(a)(1) and (3) of the Act:

(a) Disciplining Tomer Malchi pursuant to an unlawful rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

(b) Discriminatorily preventing Malchi from working shifts at other Starbucks locations.

(c) Issuing negative employment evaluations to Daniel Gross on January 29, April 14 and 29, and August 5, 2006.

(d) Issuing a written warning to Daniel Gross on August 5, 2006.

(e) Discharging employees Joseph Agins Jr., Isis Saenz, and Daniel Gross.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent, to the extent it has not done so, rescind and give no further effect to its work rules found unlawful herein, and that Respondent remove from its files any unlawful discipline issued to or reference to such discipline issued to Tomer Malchi or performance evaluations or discipline issued to Daniel Gross as is consistent with my findings herein, notify these employees that it has done so and that it will not rely upon these warnings or other disciplinary memoranda. I further recommend that Respondent make Gross whole for any failure to increase his compensation due to unlawful performance evaluations issued to him, and that the precise amount to be awarded to Gross be determined in a supplemental compliance proceeding, if necessary.

Having found that Respondent has discriminatorily discharged employees, I recommend that it offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall remove from its files of these employees any reference to their discharges and shall thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

The Respondent shall also post an appropriate notice, as described in the order herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[89]

ORDER

The Respondent, Starbucks Corporation d/b/a Starbucks Coffee Company, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing the Union while off duty.

(b) Discriminatorily prohibiting employees at Respondent's Union Square East store to use a company bulletin board to post items of a nonwork nature, including materials relating to the Union.

(c) Prohibiting off-duty employees employed at Respondent's Union Square East store from entering the back of the store.

(d) Implementing and enforcing a rule prohibiting employees from wearing more than one prounion button at any given time.

(e) Promulgating and maintaining a rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

(f) Promulgating and maintaining a rule prohibiting employees from talking about terms and conditions of employment.

(g) Disciplining employees pursuant to an unlawful rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

(h) Discriminatorily preventing employees from working shifts at other Starbucks locations.

(i) Issuing negative employment evaluations to or written warnings to employees because they support the Union or because of their other concerted, protected activities.

(j) Discharging employees because of their support for the union or their other concerted, protected activities.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, remove from its files all discipline issued to Tomer Malchi on May 13, 2006, pursuant to an unlawful rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions, and within 3 days notify Malchi in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days of the Board's order, remove from its files those employment evaluations issued to Daniel Gross on January 29, April 14 and 29, and August 5, 2006, and a corrective action issued to him on August 5, 2006, within 3 days notify Gross in writing that this has been done and that these evaluations or other disciplinary memoranda will not be used against him in any way. Respondent shall also make Gross whole for any loss of compensation he may have suffered as a result of the above-noted disciplinary performance evaluations in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order offer Joseph Agins Jr., Isis Saenz, and Daniel Gross full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Respondent shall also make Agins, Saenz and Gross whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

[89] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."[90] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 19, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C., December 19, 2008.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing the Union while off duty.

WE WILL NOT discriminatorily prohibit employees at our Union Square East store from using a company bulletin board to post material of a nonwork nature, including materials relating to the Union.

WE WILL NOT discriminatorily prohibit our off-duty employees at our Union Square East store from entering the back of the store.

WE WILL NOT implement or enforce a rule prohibiting you from wearing more than one prounion button at any given time.

WE WILL NOT prohibit you from discussing the Union while allowing other nonwork-related discussions.

WE WILL NOT prohibit you from talking about terms and conditions of employment with your coworkers.

WE WILL NOT discipline you for talking about the Union while allowing other nonwork-related discussions.

WE WILL NOT discriminatorily prevent you from working shifts at other Starbucks locations.

WE WILL NOT issue written warnings or negative employment evaluations to you because you support the Union or because of your other concerted, protected activities.

WE WILL NOT discharge you because of your support for the Union or your other concerted, protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any discipline issued to Tomer Malchi pursuant to a discriminatory rule prohibiting employees from talking about the Union and WE WILL, within three days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL remove from our files employment evaluations to Daniel Gross January 29, April 14 and 29, and August 5, 2006, and a corrective action issued to him on August 5, 2006, WE WILL within 3 days thereafter notify Gross in writing that this has been done and that the employment evaluations and discipline will not be used against him in any way and WE WILL Gross whole for any loss of earnings and other benefits suffered as a result of the aforementioned performance evaluations.

WE WILL offer Joseph Agins Jr., Isis Saenz, and Daniel Gross full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Agins Jr., Isis Saenz, and Daniel Gross whole for any loss of earnings and other benefits suffered as a result of their discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Joseph Agins Jr., Isis Saenz, and Daniel Gross and within 3 days

[90] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

STARBUCKS CORPORATION D/B/A STARBUCKS COFFEE COMPANY